

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TEVRA BRANDS, LLC,) C-19-04312 BLF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) NOVEMBER 3, 2021
)
BAYER HEALTHCARE LLC, AND BAYER) PAGES 1-63
ANIMAL HEALTH GMBH, AND BAYER)
AG,)
)
DEFENDANTS.)
_____)

TRANSCRIPT OF ZOOM PROCEEDINGS
BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: POSINELLI LLP
BY: COLBY B. SPRINGER
THREE EMBARCADERO CENTER, SUITE 2400
SAN FRANCISCO, CALIFORNIA 94111

BY: DANIEL D. OWEN
900 WEST 48TH PLACE, SUITE 900
KANSAS CITY, MISSOURI 64112

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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APPEARANCES (CONTINUED)

FOR THE DEFENDANTS: ARNOLD & PORTER KAYE SCHOLER LLP
BY: DANIEL B. ASIMOW
 SEAN M. CALLAGY
THREE EMBARCADERO CENTER, 10TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

1 SAN JOSE, CALIFORNIA

NOVEMBER 3, 2021

2 P R O C E E D I N G S

3 (ZOOM PROCEEDINGS CONVENED AT 9:34 A.M.)

4 THE COURT: OKAY. LET'S GO ON TO OUR NEXT CASE.

5 THE CLERK: OKAY. WE'RE GOING TO BE MOVING ON TO THE
6 TEVRA BRANDS CASE NEXT. IF REGISTERED COUNSEL WILL PLEASE
7 RAISE YOUR HANDS.

8 (PAUSE IN PROCEEDINGS.)

9 THE CLERK: AND I'M GOING TO SEND YOU AN INVITATION
10 TO JOIN AS A PANELIST. IF YOU WOULD PLEASE ACCEPT THE
11 INVITATION.

12 (PAUSE IN PROCEEDINGS.)

13 THE CLERK: OKAY, YOUR HONOR.

14 THE COURT: IS -- OH, THERE'S MR. ASIMOW. I FIGURED
15 HE WOULD MOST DEFINITELY BE JOINING US TODAY.

16 ALL RIGHT. GOOD MORNING TO ALL OF YOU. LET'S CALL THE
17 CASE AND GET YOUR APPEARANCES.

18 THE CLERK: CALLING CASE 19-4312, TEVRA BRANDS LLC
19 VERSUS BAYER HEALTHCARE LLC, ET AL.

20 COUNSEL, IF YOU WOULD PLEASE STATE YOUR APPEARANCES, AND
21 IF WE COULD BEGIN WITH PLAINTIFF AND THEN MOVE TO DEFENDANT.

22 MR. SPRINGER: GOOD MORNING, YOUR HONOR.

23 COLBY SPRINGER AND DANIEL OWEN FOR THE PLAINTIFF, AND
24 UNLESS THE COURT HAS ANY OBJECTION, MR. OWEN WILL BE MAKING THE
25 ARGUMENT TODAY, SO I'LL TURN OFF MY CAMERA AND AUDIO UNLESS

1 THERE'S ANY PARTICULAR NEED.

2 THE COURT: NO. YOU'RE WELCOME TO STAY ON.

3 MR. SPRINGER: I'LL BE HERE. I JUST FIGURED, I'VE
4 GRACED EVERYONE WITH MY PRESENCE, SO, YOU KNOW --

5 (LAUGHTER.)

6 THE COURT: THANK YOU.

7 MR. SPRINGER: I DON'T WANT TO DISTRACT EVERYONE WITH
8 MY GREAT LOOKS, YOUR HONOR, SO I'LL TURN IT OVER TO MR. OWEN.

9 THE COURT: MR. OWEN, GOOD MORNING TO YOU.

10 MR. OWEN: GOOD MORNING, YOUR HONOR.

11 MR. ASIMOW: AND GOOD MORNING, YOUR HONOR.

12 DANIEL ASIMOW AND SEAN CALLAGY FOR DEFENDANTS.

13 THE COURT: GOOD MORNING.

14 AND, MR. ASIMOW, I JUST WANTED TO FOLLOW UP FROM LAST
15 WEEK. I'M SORRY I WAS SO EXASPERATED WITH YOU WHEN WE HAD, HAD
16 TO CONTINUE THE HEARING. WE GAVE SOME THOUGHT TO HOW WE COULD
17 BETTER HAVE BEEN AVAILABLE TO YOU WHEN WE HAD A SCHEDULING
18 PROBLEM, AND I -- SO I'M SORRY IF I SEEMED SO EXASPERATED.

19 MR. ASIMOW: YOUR HONOR, NOT AT ALL. IT'S REALLY A
20 LESSON TO ME NOT TO TRY TO CUT IT SO CLOSE WITH THE HEARING. I
21 DON'T BELIEVE I'VE EVER HAD TO DO ANYTHING LIKE THAT BEFORE,
22 AND I FEEL TERRIBLE ABOUT INCONVENIENCING THE COURT AND OTHER
23 COUNSEL.

24 SO I AM WITH YOU FOR AS LONG AS YOU NEED TODAY AND WE
25 WILL -- WE'LL AVOID CREATING THAT TYPE OF CONFLICT.

1 THE COURT: ALL RIGHT. AND I HOPE YOU MADE YOUR
2 FLIGHT.

3 MR. ASIMOW: I DID, WITH ABOUT TEN MINUTES TO SPARE.

4 THE COURT: YIKES. THAT'S A LITTLE CLOSE FOR
5 COMFORT.

6 OKAY. AND, MR. OWEN, YOU CERTAINLY EXTENDED YOUR COURTESY
7 TO MR. ASIMOW, AND I KNOW HE'S EXPRESSED HIS APPRECIATION FOR
8 THAT.

9 MR. OWEN: SURE THING, YOUR HONOR.

10 CAN WE MOVE THIS ALONG? I'VE GOT TO CATCH A PLANE IN A
11 FEW MINUTES.

12 (LAUGHTER.)

13 MR. OWEN: NO, I'M JOKING, OF COURSE.

14 THE COURT: OKAY.

15 MR. OWEN: AND I WAS AWARE, AND MR. ASIMOW RAISED IT
16 WITH ME, THAT HE HAD THIS PLANE AND HOPED WE COULD GO AT THE
17 FRONT OF THE DOCKET, AND FRANKLY, I WAS HOPING TO HAVE A
18 HEARING IN PERSON, BUT HE JUST WASN'T ABLE TO GET A WORD IN TO
19 GET TO THE FRONT OF THE DOCKET. AND I KNEW WHAT HE WAS TRYING
20 TO DO, WE TALKED ON THE PHONE THAT MORNING. IT'S JUST
21 UNFORTUNATE THE WAY IT WORKED OUT.

22 THE COURT: OKAY. SO YOU RAISE AN INTERESTING ISSUE,
23 MR. OWEN. I WOULD WELCOME AN IN PERSON HEARING IF ALL COUNSEL
24 WERE WILLING. YOU ARE THE ONES WHO WOULD HAVE TO GET ON AN
25 AIRPLANE, AND SO I'M VERY SENSITIVE TO PEOPLE'S RETICENCE TO DO

1 THAT.

2 BUT IF YOU, IN THE FUTURE -- ALTHOUGH AFTER THIS HEARING,
3 WE MAY BE DONE FOR AWHILE -- BUT IF YOU WANT AN IN PERSON
4 HEARING, ALL YOU NEED TO DO IS ASK, BECAUSE I'M IN COURT.
5 WE'RE HERE EVERY DAY.

6 MR. OWEN: OKAY. I WOULD HAVE PREFERRED TO HAVE DONE
7 IT, BUT, AGAIN, MR. ASIMOW AND I SPOKE A COUPLE WEEKS BEFORE
8 THE HEARING AND CONCLUDED IT WOULD BE BETTER TO DO IT BY ZOOM.

9 THE COURT: OKAY.

10 MR. OWEN: SO I AM --

11 THE COURT: THAT'S FINE.

12 MR. OWEN: I DON'T WANT TO SPEND MONEY UNNECESSARILY,
13 BUT I THINK THERE'S VALUE IN IN PERSON HEARINGS.

14 THE COURT: SURE.

15 MR. OWEN: AND QUITE FRANKLY, I LIVE IN KANSAS, BUT
16 MY GREAT GRANDFATHER WAS BROUGHT IN A LITERAL COVERED WAGON AND
17 WE'VE BEEN TRAPPED HERE FOR GENERATIONS.

18 THE COURT: THERE YOU GO.

19 (LAUGHTER.)

20 THE COURT: ALL YOU NEED TO DO IS PULL THAT COVERED
21 WAGON OUT OF THE GARAGE AND BRING IT ON. THAT WOULD BE FINE.

22 OKAY. ALL RIGHT. SO LET'S GET DOWN TO WORK. I CERTAINLY
23 HAVE SPENT A LOT OF TIME LOOKING OVER THE NEW PLEADING, AND
24 MR. OWEN HAS MADE SIGNIFICANT CHANGES IN THE SHAPE AND CONTOURS
25 OF THE CASE.

1 I WANTED TO GO THROUGH WHAT I IDENTIFIED AS FIVE ISSUES,
2 AND THAT MAY BE A GROSS OVERSIMPLIFICATION, TO GIVE YOU SOME
3 GUIDANCE ON WHERE I'M LEANING, AND THEN I, AS ALWAYS, WANT
4 REALLY TO HEAR FROM YOU. BUT I THINK IT HELPS YOU TO KNOW
5 WHERE I AM AT THIS POINT.

6 SO I'M GOING TO START WITH THE BIGGEST ISSUE, WHICH IS THE
7 RELEVANT MARKET. THERE'S BEEN A BIG CHANGE. THE LIMITATION ON
8 THE CHANNELS OF SALES HAS BEEN ELIMINATED. THAT AFFECTS THE
9 PERCENTAGE OF THE MARKET THAT CAN BE ALLEGED THAT BAYER HAS,
10 BUT I DON'T THINK IT TAKES IT DOWN TOO LOW FOR THE ARGUMENTS
11 THAT ARE MADE.

12 I CONTINUE TO HAVE CONCERNS ABOUT THE -- ABOUT THE
13 RELEVANT MARKET. I AM CONCERNED THAT PRODUCTS WITH --
14 CONTAINING FIPRONIL ARE ELIMINATED AND THAT THE -- AND THAT THE
15 IMIDACLOPRID IS THE SOLE INGREDIENT.

16 BUT I -- AND THAT COLLARS ARE ELIMINATED AND THE ORAL
17 MEDICATIONS HAVE BEEN ELIMINATED. THIS IS ONLY SQUEEZE ON WITH
18 THIS PARTICULAR CHEMICAL.

19 IT SEEMS VERY NARROW TO ME, BUT I -- AT THE END OF THE
20 DAY, MR. ASIMOW, I THINK I'M REACHING TOO FAR INTO WHAT EXPERTS
21 REALLY NEED TO TELL ME ABOUT THE MARKET. I DON'T EVEN OWN A
22 DOG, SO I DON'T EVEN KNOW WHAT -- I MEAN, AND NOT THAT -- AND
23 MAYBE THAT'S GOOD BECAUSE I DON'T KNOW WHAT CONSUMERS THINK
24 WHEN THEY'RE STANDING AT THE STORE LOOKING TO BUY ONE OF THESE
25 PRODUCTS.

1 BUT A -- I WOULD EXPECT THAT IN A CASE LIKE THIS, THE
2 PARTIES WILL CONSIDER CONSUMER SURVEYS ON THIS ISSUE. YOU'RE
3 NOT REQUIRED TO. I HAVE HAD CASES WHERE THERE WERE NO CONSUMER
4 SURVEYS AND IT'S JUST A WAY OF PRESENTING IT. I'M NOT THE ONE
5 WHO'S MAKING THOSE DECISIONS.

6 BUT AT THE END OF THE DAY, I THINK AT A MOTION TO DISMISS
7 THAT I CAN'T GO ANY FURTHER.

8 YOU KNOW MY VIEW ON WHAT I THINK THE WEAKNESSES ARE, BUT
9 ULTIMATELY A JURY WILL TELL US IF THEY AGREE, AND WE'LL ALL BE
10 BETTER EDUCATED LATER.

11 THE SECOND ISSUE THAT IS RAISED IS THIS SECOND BRAND
12 STRATEGY. IT -- AND IT'S AN INTERESTING ARGUMENT, AND
13 MR. OWEN, I ACTUALLY FOUND, ALTHOUGH I DIDN'T READ THE ARTICLES
14 THEMSELVES, BUT THE BRIEF SUMMARY OF THE ACADEMIC STUDIES THAT
15 YOU PRESENTED MAKE ECONOMIC SENSE IN TERMS OF THE POTENTIAL
16 ANTICOMPETITIVE EFFECTS OF A SPONSORED SECOND BRAND ON PRICES,
17 OF KEEPING ALL PRICES UP ARTIFICIALLY.

18 BUT I DON'T SEE ANY SUPPORT FOR THE SECOND BRAND STRATEGY
19 BEING ANTICOMPETITIVE IN THE LAW, AND IN FACT, I'M INCLINED TO
20 FIND THAT IT'S PRO COMPETITIVE AS A MATTER OF LAW, AS
21 MR. ASIMOW HAS ARGUED, WHICH WOULD ELIMINATE THE SECOND BRAND
22 STRATEGY AS ONE OF YOUR THEORIES.

23 THAT -- I'LL JUMP TO WHAT IS I THINK SORT OF A SEPARATE
24 ISSUE, WHICH IS THE PERSONAL JURISDICTION ARGUMENT REGARDING
25 BAYER GMBH. I'LL POSE THE QUESTION TO YOU: IF I PRECLUDE THE

1 SECOND BRAND STRATEGY, IS THAT THE END OF THE ARGUMENT ON
2 PERSONAL JURISDICTION? I THINK IT MAY BE.

3 BUT EVEN IF IT'S NOT, I ACTUALLY AM NOT PERSUADED THAT YOU
4 HAVE SHOWN PURPOSEFUL DIRECTION UNDER THE EFFECTS TEST, AND I'M
5 REALLY BASING THAT ON THE DEPOSITIONS OF THE DEFENDANT'S
6 EMPLOYEES, BOTH IN THE U.S., AND THOSE DEPOSITIONS THAT I FEEL
7 SAY -- CAN ONLY BE INTERPRETED AS SAYING THAT THIS WAS HIGH
8 LEVEL STRATEGY AND NOT DIRECTION.

9 ON THE LAST TWO ISSUES THAT I THINK ARE ADDRESSED -- AND
10 IF I'VE MISSED THINGS, YOU'LL CERTAINLY REMIND ME OF THEM -- ON
11 THE FORECLOSURE ISSUE, EXCLUSIVE DEALING, MR. ASIMOW, I THINK
12 YOU'VE MADE SOME GOOD POINTS, BUT I'VE ALREADY RULED ON THIS.
13 I SEE NO REASON TO GO BACK ON THAT RULING.

14 AND ON MONOPOLY POWER, I'VE ALREADY APPROVED THAT AS WELL
15 AND, YES, YOU POINT OUT SOME FLAWS ON THE MONOPOLY POWER, BUT I
16 THINK I'M PREPARED TO GO FORWARD ON THAT AS WELL.

17 AND I DID NOT READ QUALCOMM AS REQUIRING ME TO GO BACK
18 OVER THE MONOPOLY POWER ISSUE, ALTHOUGH QUALCOMM IS A LITTLE
19 HARD TO GET THROUGH FOR MANY REASONS.

20 ALL RIGHT. THAT'S MY HIGH LEVEL. I JUST WANTED TO WALK
21 THROUGH IT.

22 I ORGANIZED THE ISSUES THAT WAY AS TO THOSE FIVE THINGS.

23 SO, MR. ASIMOW, IT IS YOUR MOTION. IF I'VE MISSED SOME
24 GROSS CATEGORY, PLEASE LET ME KNOW BECAUSE THIS IS SORT OF MY
25 OUTLINE. BUT THERE ARE OBVIOUSLY SUB-ISSUES HERE AND I

1 RECOGNIZE THAT.

2 SO LET ME START WITH THE DEFENDANTS, IT IS YOUR MOTION,
3 AND THEN I'LL TURN TO MR. OWEN.

4 MR. OWEN: YOUR HONOR, COULD I JUST TAKE ONE OF THOSE
5 ISSUES OFF THE TABLE FOR YOU?

6 THE COURT: SURE.

7 MR. OWEN: I WOULD AGREE THAT THE ONLY ALLEGATIONS OF
8 GM -- OF THE GERMAN COMPANY, BAYER ANIMAL HEALTH GMBH,
9 PARTICIPATING IN STRATEGIES TO BLOCK GENERIC ENTRY COME IN THE
10 FORM OF THE SECOND BRAND STRATEGY.

11 NOW, WE THINK THEY'RE SUFFICIENT, BUT IF, IN FACT, THE
12 COURT FINDS THE SECOND BRAND STRATEGY TO BE PRO COMPETITIVE, WE
13 DON'T MAKE ANY OTHER ALLEGATIONS THAT GMBH WAS DIRECTLY
14 INVOLVED OR PURPOSEFULLY DIRECTING WITH ANYTHING OTHER THAN THE
15 SECOND BRAND STRATEGY.

16 THE COURT: THANK YOU. THAT'S REALLY HELPFUL. GOOD.

17 ALL RIGHT. WITH THAT, MR. ASIMOW, WHY DON'T YOU START?

18 MR. ASIMOW: SURE. THANK YOU, YOUR HONOR. I
19 APPRECIATE THE COURT'S GUIDANCE. I KNOW THE COURT HAS SPENT A
20 LOT OF TIME ON THIS CASE AND THINKING ABOUT IT.

21 OUR PLAN WAS I WOULD ADDRESS THE ANTITRUST ISSUES AND MY
22 PARTNER, MR. CALLAGY, WILL ADDRESS PERSONAL JURISDICTION.

23 THE COURT: ALL RIGHT.

24 MR. ASIMOW: AND I CERTAINLY AGREE WITH THE COURT,
25 THE MARKET DEFINITION IS THE MOST IMPORTANT ISSUE HERE, BECAUSE

1 IF THE MARKET IS NOT ADEQUATELY ALLEGED, ALL OF THE CLAIMS NEED
2 TO BE DISMISSED THEN, SO THAT'S THE FOUNDATION FOR EVERY ONE OF
3 THE CLAIMS HERE.

4 THE COURT: RIGHT.

5 MR. ASIMOW: AND I ALSO AGREE WITH THE COURT THAT THE
6 SECOND AMENDED COMPLAINT IS BETTER. IT DOES HAVE MORE
7 ALLEGATIONS THAN THE FIRST AMENDED COMPLAINT.

8 BUT I STILL THINK, WHEN WE -- WHEN WE DRILL DOWN ON IT,
9 THERE IS NOT ENOUGH THERE TO OVERCOME THE COMMON SENSE
10 REALIZATION THAT TWO FLEA AND TICK PRODUCTS FOR COMPANION
11 ANIMALS THAT DO THE SAME THING THAT ARE SOLD SIDE BY SIDE
12 AGAINST EACH OTHER ARE COMPETITIVE.

13 AND THE ONE I REALLY WANT TO FOCUS ON, BECAUSE IT'S ENOUGH
14 TO GRANT THE MOTION, IS THE BRAND FIPRONIL PRODUCT, FRONTLINE.
15 IF FRONTLINE IS IN THE SAME MARKET AS THE BAYER TOPICAL
16 IMIDACLOPRID PRODUCTS, THEN I THINK THE RELEVANT SHARES WILL BE
17 TOO LOW FOR, FOR EITHER EXCLUSIVE DEALING AND CERTAINLY FOR
18 MONOPOLIZATION TO GO FORWARD.

19 I THINK THE OTHER PRODUCTS, THE TOPICALS AND THE COLLARS
20 ARE ALSO IN THE SAME MARKET, BUT WE DON'T EVEN HAVE TO GET
21 THERE IF THE BRAND FIPRONIL PRODUCT IS IN THE SAME MARKET.

22 BUT I DO THINK, AS THE COURT NOTED IN ITS PRIOR ORDER,
23 COMMON SENSE DOES PLAY A ROLE HERE AS A STARTING POINT.

24 AND WE ALSO KNOW, FROM THE COMPLAINT, AS WELL AS SHOWN IN
25 THE DOCUMENTS THAT ARE REFERENCED IN THE COMPLAINT, THAT BAYER

1 TRACKS ITS PRODUCTS AGAINST OTHER FLEA AND TICK PRODUCTS, AND
2 IN PARTICULAR AGAINST FRONTLINE, WHICH IS ACTUALLY THE MARKET
3 LEADER WITH A SIGNIFICANTLY LARGER SHARE THAN THE BAYER
4 PRODUCT.

5 AND AS IN THE GERMAN AUTO PARTS CASE, THE CAR CASE, IT
6 WOULDN'T MAKE ANY SENSE TO DO THAT IF THE PRODUCTS DID NOT
7 COMPETE.

8 AGAINST THAT BACKGROUND, AS I READ THE COMPLAINT,
9 PLAINTIFF HAS COME FORTH WITH FOUR SETS OF ALLEGATIONS ABOUT
10 WHY FRONTLINE SHOULD NOT BE IN THE SAME MARKET, AND I -- I'LL
11 TAKE THOSE ONE BY ONE WITH THE COURT'S PERMISSION.

12 THE COURT: OKAY.

13 MR. ASIMOW: WE CAN STOP THERE IF ARE QUESTIONS ABOUT
14 ANY OF THEM.

15 THE FIRST REASONS THAT PLAINTIFF GIVES ARE THAT THERE ARE
16 SOME DIFFERENCES BETWEEN THE PRODUCTS, THAT CONSUMERS MIGHT
17 HAVE A PREFERENCE FOR ONE OVER THE OTHER.

18 WE'VE SEEN THIS ALLEGATION BEFORE, ONE KILLS FLEAS AND THE
19 TICKS; AND THE OTHER, IN ADDITION TO KILLING THEM, REPELS THEM.

20 I THINK THOSE ARGUMENTS HAVE ALREADY BEEN CONSIDERED BY
21 THE COURT AND REJECTED IN THE LAST ORDER, THE SEPTEMBER 2020
22 ORDER.

23 AND AS THE COURT EXPLAINED AT THAT TIME, THESE ARE MINOR
24 DIFFERENCES AND THEY ARE INSUFFICIENT TO PUT THE PRODUCTS IN A
25 DIFFERENT MARKET.

1 AND, INDEED, IF THEY -- IF THAT WAS ENOUGH, THEN, AS THE
2 COURT POINTED OUT, TEVRA WOULD NOT BE IN THE SAME MARKET AS
3 BAYER BECAUSE TEVRA ALLEGES THERE ARE DIFFERENCES IN THE
4 EFFECTIVENESS AND THE PRICING OF ITS PRODUCT, AND IT HAS TO BE
5 IN THE SAME MARKET IF IT WANTS TO HAVE STANDING TO BRING AN
6 ANTITRUST CLAIM AGAINST BAYER.

7 SO I THINK THOSE -- THAT SET OF ALLEGATIONS HAS ALREADY
8 BEEN ADDRESSED BY THE COURT.

9 SO I TURN THEN TO ONE THAT I THINK PLAINTIFF PUTS A LOT OF
10 WEIGHT ON AND THAT WE NEED TO CONSIDER CAREFULLY, AND THAT'S
11 ABOUT THE INTRODUCTION OF GENERIC FIPRONIL IN 2011 AND
12 PLAINTIFF'S ALLEGATION THAT THAT CREATED A NATURAL EXPERIMENT
13 TO LET US SEE IF FIPRONIL IS IN THE SAME MARKET AS TOPICAL
14 IMIDACLOPRID PRODUCTS.

15 I THINK THERE ARE MULTIPLE REASONS WHY THE ALLEGATION IS
16 NOT SUFFICIENT.

17 SO, FIRST, THIS IS CONCERNING GENERIC FIPRONIL PRODUCTS,
18 NOT THE BRAND FRONTLINE PRODUCT, WHICH HAS ALWAYS BEEN THE
19 PRIMARY COMPETITOR TO BAYER'S ADVANTIX AND ADVANTAGE PRODUCTS.
20 SO I DON'T THINK THIS EVEN WILL SHOW, AS I'LL GET TO IN A
21 MOMENT, THAT GENERIC FIPRONIL IS IN A DIFFERENT MARKET.

22 BUT EVEN IF IT WERE, THAT WOULDN'T TELL US WHETHER BRAND
23 FIPRONIL IS IN A DIFFERENT MARKET.

24 AND IT'S NOT SURPRISING THAT THE COMPETITION WOULD MORPH
25 BETWEEN THE TWO LEADING BRAND PRODUCTS. FOR A CONSUMER TO

1 SWITCH FROM BRAND IMIDACLOPRID, LIKE K9 ADVANTIX, TO A GENERIC
2 FIPRONIL, THEY'RE KIND OF MAKING TWO JUMPS. THEY'RE CHANGING
3 INGREDIENTS, AND THEY'RE GOING FROM A BRAND TO A GENERIC
4 PRODUCT.

5 SO IT'S NOT SURPRISING THAT THAT WOULD BE A MORE
6 ATTENUATED COMPETITION THAN THE COMPETITION BETWEEN THE BRAND
7 PRODUCTS. AND AS I SAY, IF THE BRAND PRODUCT IS IN THE SAME
8 MARKET, THAT MEANS THAT BAYER DOES NOT HAVE MARKET POWER.

9 BUT EVEN TURNING TO THE GENERIC PRODUCT, HERE'S WHY I
10 DON'T THINK THAT'S A SUFFICIENT ALLEGATION THAT IT IS AN
11 ACCEPTED MARKET.

12 PLAINTIFF TELLS US THAT BAYER WAS ABLE TO INCREASE PRICES
13 OVER A FIVE YEAR PERIOD FROM BETWEEN -- BETWEEN 8 AND 17
14 PERCENT.

15 THE SSNIP TEST THAT THE PLAINTIFF ATTEMPTS TO INVOKE,
16 HOWEVER, FOCUSES ON A SINGLE PRICE INCREASE, NOT A SERIES OF
17 PRICE INCREASES OVER TIME.

18 AND, IN FACT, WE CITE A CASE --

19 THE COURT: YEAH.

20 MR. ASIMOW: -- THAT EXCLUDES AN EXPERT, GRANTS A
21 DAUBERT FOR THAT VERY REASON.

22 THE COURT: IS THAT THE KENTUCKY SPEEDWAY CASE?

23 MR. ASIMOW: EXACTLY.

24 BUT EVEN -- BUT BEYOND THAT, PLAINTIFF DOESN'T TELL US
25 WHAT HAPPENED TO THE PRICE OF GENERIC FIPRONIL DURING THE SAME

1 PERIOD. THE PLAINTIFF ALLEGES THAT GENERIC FIPRONIL ENTERED
2 THE MARKET AT A 10 TO 20 PERCENT DISCOUNT TO BRAND FIPRONIL,
3 BUT UNLESS I'VE MISSED IT, THERE'S NO ALLEGATION IN THE
4 COMPLAINT ABOUT WHETHER THOSE PRICES HELD CONSTANT OVER TIME OR
5 HOW THEY CHANGED.

6 SO WE DON'T HAVE A COMPARATOR HERE. WE DON'T KNOW WHAT
7 WAS HAPPENING TO COMPETITIVE PRICES DURING THIS TIME, SO WE
8 DON'T KNOW IF BAYER HAD THE POWER, OVER A FIVE YEAR PERIOD, TO
9 INCREASE ITS PRICE EVEN AS COMPETITORS HELD THEIR PRICES
10 CONSTANT.

11 SO I THINK THAT THAT'S A FATAL FLAW, EVEN TO THE
12 CONCLUSION THAT GENERIC FIPRONIL IS IN A DIFFERENT MARKET FROM
13 TOPICAL IMIDACLOPRID BRAND, THE BAYER PRODUCTS.

14 THE THIRD REASON PLAINTIFF GIVES FOR SAYING THAT THE
15 PRODUCTS ARE IN DIFFERENT MARKETS IS DOCUMENTS THAT WE'VE
16 PRODUCED IN DISCOVERY. YOU KNOW, WHAT'S INTERESTING ABOUT THIS
17 CASE IS THAT WE'RE TWO AND A HALF YEARS INTO THE CASE AND THE
18 DOCUMENT DISCOVERY IS LARGELY COMPLETED.

19 THE COURT: YEAH.

20 MR. ASIMOW: WE HAVEN'T HAD DEPOSITIONS, OTHER THAN
21 THE JURISDICTIONAL ONES, BUT TEVRA HAS A LOT OF OUR DOCUMENTS
22 AND, YOU KNOW, IT'S DOING ITS BEST TO MAKE USE OF THOSE IN
23 ORDER TO STATE A CLAIM.

24 THE COURT: UM-HUM.

25 MR. ASIMOW: YOU KNOW, I THINK THAT THE HORSE IS OUT

1 OF THE BARN ON THAT ONE ABOUT WHETHER YOU NEED TO STATE A CLAIM
2 BEFORE YOU GET DISCOVERY, BUT WE ARE WHERE WE ARE AND I ACCEPT
3 THAT.

4 THE COURT: YEAH.

5 MR. ASIMOW: BUT I DON'T THINK THESE DOCUMENTS -- I
6 THINK IF YOU LOOK AT THESE DOCUMENTS, THEY ACTUALLY SUPPORT THE
7 OPPOSITE CONCLUSION, AND I HAVE -- I DON'T KNOW IF THIS WILL
8 WORK, BUT I HAVE A FEW OF THEM UP HERE WITH A POWERPOINT THAT I
9 CAN TRY TO SCREEN SHARE.

10 THE COURT: TIFFANY, CAN YOU -- I DON'T KNOW WHETHER
11 YOU HAVE TO GIVE MR. ASIMOW SOME AUTHORITY TO DO THAT.

12 THE CLERK: YES, HE SHOULD BE ABLE TO SHARE NOW.

13 MR. ASIMOW: IT'S GOING TO TAKE UP MY SCREEN -- RIGHT
14 NOW IT'S GOING TO TAKE UP MY SCREEN WHERE I SEE THE COURT.

15 THE COURT: WELL, WE'RE MOSTLY GOING TO SEE -- OKAY,
16 YEAH, GOOD.

17 MR. ASIMOW: OKAY, GREAT.

18 SO, YOUR HONOR, THIS ONE, WHICH IS EXHIBIT 1 TO THE
19 DECLARATION THAT I SUBMITTED WITH THE MOTION TO DISMISS, IS
20 FROM A DOCUMENT REFERENCED AT PARAGRAPHS 41 AND 42 OF THE
21 COMPLAINT. IT'S AN INTERNAL PRESENTATION TO THE STRATEGIC
22 LEADERSHIP TEAM, AND IT'S CITED BY THE PLAINTIFF FOR THE
23 PROPOSITION THAT BAYER DID NOT LOSE A LOT OF SALES BETWEEN 2010
24 AND 2016.

25 THERE ARE A NUMBER OF SLIDES IN THE DECK, AND I PICKED ONE

1 THAT I THOUGHT WAS SIGNIFICANT TO SHARE WITH THE COURT.

2 I THINK THERE ARE SEVERAL -- SO, YES, IT DOES SHOW MODEST
3 GROWTH IN THE ADVANTIX OR THE BAYER MARKET SHARE FROM 2010 TO
4 2013, BUT THEN IT SHOWS IT STARTING TO DECLINE.

5 IT ALSO SHOWS THAT FRONTLINE CONSISTENTLY HAD A MUCH
6 LARGER SHARE. IT SEEMS TO ME THAT IF THIS IS THE EVIDENCE FOR
7 THE SUPPORT FOR THE ALLEGATION THAT BAYER'S MARKET SHARE HELD
8 UP EVEN AS GENERIC FIPRONIL PRODUCTS ENTERED, THE STRONGER
9 CONCLUSION TO DRAW FROM IT IS THAT BAYER TRACKS A VARIETY OF
10 PRODUCTS, THAT BAYER'S MARKET SHARE DECLINED AFTER -- F PLUS T
11 IS FLEA AND TICK --

12 THE COURT: THANK YOU.

13 MR. ASIMOW: YEAH. THE ABBREVIATION WE MOST OFTEN
14 SEE IN THIS CASE, IF YOU LOOK THROUGH THE DOCUMENTS, ARE F AND
15 T --

16 THE COURT: OKAY.

17 MR. ASIMOW: -- AND C-A-P, WHICH IS COMPANION ANIMAL
18 PRODUCTS, SO THESE ARE FOR THE DOGS AND CATS AND NOT FOR FARM
19 ANIMALS.

20 THE COURT: OKAY. SO THEN ORALS MEANING A LIQUID OR
21 PILL THAT IS INGESTED?

22 MR. ASIMOW: THAT'S EXACTLY RIGHT.

23 THE STRONGEST COMPETITION AND WHAT, IN OUR VIEW, HAS
24 CAUSED BOTH ADVANTIX AND FRONTLINE TO LOSE SHARE IS THE
25 INTRODUCTION OF ORALS, MANY OF WHICH HAVE IMIDACLOPRID AS THEIR

1 ACTIVE INGREDIENT, AND THE ABILITY TO PURCHASE THESE IN SOME
2 INSTANCES OVER THE COUNTER.

3 A LOT OF PET OWNERS FIND THAT TO BE MORE EFFECTIVE, AND
4 THAT'S REALLY THE POINT OF THIS SLIDE.

5 YOU KNOW, I DON'T THINK THIS WILL SUPPORT A CONCLUSION
6 THAT ADVANTIX AND FRONTLINE ARE DIFFERENT MARKETS. IF
7 ANYTHING, THEY'RE KIND OF RISING AND FALLING TOGETHER AS THEY
8 FACE OTHER COMPETITION.

9 THE COURT: WELL, AND OF COURSE THIS ALSO WOULD SHOW
10 THAT, AND WOULD SUPPORT YOUR ARGUMENT THAT ORAL PRODUCTS ARE IN
11 THE SAME PRODUCT MARKET AS THE TOPICAL.

12 MR. ASIMOW: CORRECT. I HAVE A COUPLE OTHERS I WILL
13 SHOW YOU TO THE SAME POINT.

14 THE COURT: OKAY.

15 MR. ASIMOW: I DON'T THINK THERE'S ANY DOUBT THAT
16 THAT'S WHAT MY CLIENT BELIEVES.

17 THE COURT: OKAY.

18 MR. ASIMOW: SO LET ME SHOW YOU A TOTAL OF THREE
19 DOCUMENTS ON THIS.

20 THE COURT: OKAY.

21 MR. ASIMOW: THE SECOND -- AGAIN, AN EXHIBIT TO THE
22 DECLARATION THAT WE SUBMITTED, AND REFERENCED IN THE SECOND
23 AMENDED COMPLAINT AT PARAGRAPHS 52 AND 129 -- IS A PRESENTATION
24 TO A PARTICULAR RETAILER. I REDACTED THE NAME OF THE RETAILER.

25 THE COURT: UM-HUM.

1 MR. ASIMOW: BUT THIS IS TO A RETAILER THAT OFFERED A
2 PRODUCT CALLED PETLOCK. PETLOCK IS A GENERIC IMIDACLOPRID
3 PRODUCT. IT'S A PRODUCT THAT TEVRA WOULD LIKE TO BE SELLING.
4 IT'S A COMPETITOR OF TEVRA SELLING A GENERIC IMIDACLOPRID.

5 AND TEVRA CITES THIS DOCUMENT FOR THE PROPOSITION THAT
6 BAYER TRIED TO PERSUADE THIS RETAILER NOT TO CARRY THE GENERIC
7 PRODUCT. AND THAT'S TRUE, BAYER DID TRY TO PERSUADE THE
8 RETAILER NOT TO CARRY THE GENERIC PRODUCT.

9 BUT I THINK THE BIGGER TAKE AWAY FROM IT HERE IS THAT
10 BAYER SAW THE STRONGEST COMPETITION AS THE ORAL PRODUCTS AND
11 DESIGNED A CAMPAIGN WITH THIS RETAILER TO COMPETE AGAINST THE
12 ORAL PRODUCTS, IT'S CALLED "BATTLE THE BITE," AND THE IDEA IS
13 THAT THE ORALS KILL THE FLEA AFTER IT BITES THE ANIMAL AND THAT
14 THEN INGESTS SOME OF THE ACTIVE INGREDIENT FROM THE PET'S
15 BLOOD, WHEREAS TOPICAL PRODUCTS HAVE SOME ABILITY TO REPEL
16 BEFORE THE FLEA AND TICK BITES. SO, YOU KNOW, THEY THOUGHT
17 THAT WAS A USEFUL MARKETING CAMPAIGN AND THEY WORKED ON THAT
18 WITH THE RETAILER.

19 AND YOU CAN SEE, YOU KNOW, THEM TELLING THE RETAILER THE
20 ORAL FORM IS NOW DOMINATING. 57 PERCENT SHARE.

21 BAYER IS FOCUSSED ON, HOW DOES IT COMPETE AGAINST THAT?

22 SO THERE'S OTHER INTERESTING THINGS IN THIS DOCUMENT I
23 WON'T TAKE THE TIME ON, BUT IT SHOWS A LOT OF WILLINGNESS AMONG
24 CONSUMERS TO SWITCH, THE SAME TYPE OF CONSUMER SURVEY EVIDENCE
25 THAT THE COURT ALLUDED TO EARLIER.

1 AND THE THIRD AND FINAL DOCUMENT I'LL SHOW THE COURT IS A
2 DOCUMENT THAT'S REFERENCED AT PARAGRAPH 173 AND 174 OF THE
3 SECOND AMENDED COMPLAINT. AND IT -- IT IS CITED BY THE
4 PLAINTIFF FOR THE PROPOSITION THAT BAYER SELLS 75 PERCENT OF
5 THE TOPICAL IMIDACLOPRID --

6 THE COURT: I'M LOSING YOUR VOICE, YOUR SOUND ON
7 THIS.

8 MR. ASIMOW: IS THAT BETTER IF I HOLD THIS UP A
9 LITTLE CLOSER?

10 THE COURT: YEAH. SOMETIMES THE MICROPHONE JUST
11 DOESN'T QUITE CATCH.

12 MR. ASIMOW: I'M SORRY, YOUR HONOR.

13 THE COURT: THAT'S OKAY.

14 MR. ASIMOW: I THINK WHEN I LOOK DOWN, THAT'S WHAT
15 DOES IT.

16 THE COURT: OH, YEAH.

17 MR. ASIMOW: I'M --

18 THE COURT: THANKS.

19 MR. ASIMOW: I'M BORROWING MR. OWEN'S PODIUM NEXT
20 TIME IF WE DON'T COME SEE YOU IN PERSON.

21 SO THIS IS IN REFERENCE TO PARAGRAPH 173 AND 174. IT'S AN
22 INTERNAL BAYER BRIEFING. IT'S CITED BY THE PLAINTIFF FOR THE
23 CHANNEL SPLIT, BUT I THINK THE MORE INTERESTING THING IS IT'S
24 RECOGNITION THAT FRONTLINE CONTINUES TO BE THE NUMBER ONE
25 PRODUCT; THE FLEA AND TICK MARKET, IF YOU READ THE DOCUMENT, IS

1 VERY COMPETITIVE; DIFFICULT FOR CONSUMERS TO UNDERSTAND THE
2 DIFFERENCES; PEOPLE BELIEVE THAT THERE IS LITTLE OR NO
3 DIFFERENCE BETWEEN THE PREMIUM SPOT ON BRANDS SUCH AS ADVANTIX
4 AND FRONTLINE; AND THEN THE FINAL POINT IN ADDITION TO THE
5 ENTRENCHED BRANDS, LIKE FRONTLINE, THE NEWER PRESCRIPTION ORAL
6 FLEA AND TICK PRODUCTS HAVE BEEN GAINING RAPID AWARENESS AND
7 PENETRATION.

8 MY VIEW IS IF THE PLAINTIFF WANTS TO RELY ON THESE
9 DOCUMENTS, THE WHOLE DOCUMENT IS FAIR GAME. YOU DON'T USUALLY
10 SEE THIS IN A COMPLAINT, BUT THIS, TO ME, PROVIDES SUPPORT FOR
11 WHAT'S, AGAIN, REALLY COMMON SENSE, THAT THESE PRODUCTS COMPETE
12 WITH EACH OTHER.

13 AND THEN -- LET ME -- I'LL STOP THE SHARE HERE.

14 THE -- THE FOURTH AND FINAL REASON TO ADDRESS IS THE
15 ALLEGATION IN THE COMPLAINT THAT BAYER'S PRODUCTS ARE A MARKET
16 UNTO THEMSELVES BECAUSE BAYER ALLEGEDLY GETS HIGH PRICES.

17 THE PLAINTIFF THERE PRIMARILY RELIES ON A TREATISE, AND
18 I'M NOT SURE PLAINTIFF CITES A CASE FINDING IT SUFFICIENT AT
19 THE PLEADING STAGE SIMPLY TO ALLEGE THAT THE DEFENDANT HAD HIGH
20 MARGINS.

21 AND THERE'S NO ALLEGATION IN THE COMPLAINT THAT BAYER'S
22 PROFITS OR MARGIN ARE OUT OF LINE WITH OTHER COMPETITORS IN THE
23 MARKET, AND THERE ARE A NUMBER OF COSTS HERE THAT BAYER WOULD
24 HAVE INCURRED IN DEVELOPING AND OBTAINING REGULATORY APPROVAL
25 FOR AN INSECTICIDE LIKE IMIDACLOPRID. AND I -- THERE'S NO

1 ALLEGATION THAT WHEN THAT IS TAKEN INTO ACCOUNT, THE PROFITS OR
2 MARGINS ARE EXCESSIVE.

3 IN FACT, THE PROVISIONS OF THE AREEDA TREATISE THAT
4 PLAINTIFF CITES TALK A LOT ABOUT HOW DIFFICULT IT IS TO MEASURE
5 MARKET POWER DIRECTLY BY LOOKING FOR HIGH PRICES, AND THAT'S
6 WHY COURTS SELDOM RELY ON IT.

7 WE DIRECT THE COURT TO THE SOLODYN CASE THAT NOTED THE
8 HIGH MARGINS ALONE, WITHOUT KNOWING SUBCOSTS AND OTHER FACTORS,
9 DON'T SHOW THAT THE PRICES ARE ACTUALLY SUPRA COMPETITIVE, MUCH
10 LESS SHOWING MARKET POWER.

11 SO OUR VIEW IS WHILE PLAINTIFF HAS DONE A BETTER JOB OF
12 TRYING TO ESTABLISH WHAT IS A DIFFICULT AND COUNTERINTUITIVE
13 PROPOSITION FOR IT, THAT THE BAYER MARKET IS A MARKET UNTO
14 ITSELF, IT'S NOT ENOUGH TO CARRY THE DAY AND ALL OF THE CAUSES
15 OF ACTION SHOULD BE DISMISSED ON THAT BASIS.

16 THE COURT: ALL RIGHT. MR. ASIMOW, I GUESS WHAT
17 TROUBLES ME HERE IS THAT I ACTUALLY FEEL THAT YOU'RE ASKING ME
18 TO MAKE SOME FACTUAL DETERMINATIONS IN -- WHERE THERE ARE SOME
19 DISPUTES. AND THIS WHOLE ARGUMENT OF COMMON SENSE, I -- IT IS
20 CLEARLY A THREAD THROUGH THE CASE LAW THAT -- AND IN THE VW
21 CASE I THINK IT'S FAIRLY PROMINENT -- ABOUT JUDGES APPLYING
22 COMMON SENSE.

23 AND I -- SO I CERTAINLY UNDERSTAND THAT.

24 I WILL SAY THAT I'M GOING TO COUNTER THIS WITH SOMETHING
25 THAT SEEMS LIKE IT'S COMING OUT OF LEFT FIELD. IN THE LAST

1 MONTH OR SO, I'VE BEEN READING DANNY KAHNEMAN ON
2 DECISION-MAKING, YOU MAY HAVE READ KAHNEMAN AND TVERSKY, AND
3 ONE OF THEIR FINDINGS -- HE WON A NOBEL PRIZE ON THESE
4 THEORIES -- IS THAT YOUR INITIAL IMPRESSION IS USUALLY WRONG
5 AND THAT -- AND THAT THERE ARE GREAT FALLACIES IN THINKING AND
6 IN GUT INSTINCT THINKING THAT HAS MANY MISTAKES.

7 SO I'M CHASTENED A LITTLE BIT ABOUT WHAT I'VE BEEN
8 READING, AND I -- BUT I THINK I HAVE TO BE VERY CAREFUL.

9 BUT EVEN PUTTING THAT ASIDE, I HAVE TO BE REALLY CAREFUL
10 ABOUT WHERE COMMON SENSE TAKES ME BECAUSE I CAN'T SUPPLANT THE
11 ROLE OF THE JURY.

12 AND I -- YOU KNOW, ABSENT SOME CONSUMER SURVEYS, I JUST
13 DON'T KNOW HOW I CAN APPLY MY COMMON SENSE WHEN I DON'T EVEN
14 HAVE A DOG. I MEAN, THIS IS -- I HAVE NO COMMON EXPERIENCE
15 HERE, AND, YOU KNOW, SO WHAT -- YOU KNOW, I DON'T KNOW HOW TO
16 EVEN TETHER MY -- WHAT IS COMMON SENSE TO ME. I MEAN, I
17 CERTAINLY DON'T LIKE FLEAS AND TICKS. MAYBE THAT'S WHY I DON'T
18 HAVE A DOG. SO MY METHOD IS THE MOST EFFECTIVE OF ALL, BUT
19 MOST PEOPLE WOULD SAY THAT'S NOT A VIABLE OPTION.

20 BUT ANYWAY, COMMENTS?

21 MR. ASIMOW: YES. I DON'T THINK WE WANT -- WE'RE NOT
22 GOING TO ARGUE THAT THE DECISION NOT TO HAVE A DOG IS IN THE
23 SAME MARKET.

24 THE COURT: RIGHT, RIGHT.

25 (LAUGHTER.)

1 MR. ASIMOW: WE DON'T COMPETE WITH THAT. I GUESS
2 THAT WOULD BE PET REMOVAL.

3 THE COURT: THERE YOU GO.

4 MR. ASIMOW: YOU KNOW, I THINK IT'S A DIFFICULT CALL
5 BECAUSE IT DOES -- IT STARTS TO INCH INTO FACTUAL ISSUES AND
6 THE PROVINCE OF THE JURY, OR PERHAPS A SUMMARY JUDGMENT MOTION
7 IF THERE'S NO TRIABLE ISSUE OF FACT HERE.

8 WE DO HAVE A NUMBER OF CASES, THOUGH, IN WHICH THE COURTS
9 TAKE A PRETTY HARD LOOK AT THE MARKET DEFINITION FROM THE
10 OUTSET OF THE CASE. THERE'S A NUMBER IN THIS DISTRICT THAT WE
11 PROVIDED TO THE COURT.

12 AND I THINK THAT THE TEACHING OF THOSE CASES IS THAT A
13 PLAUSIBILITY REQUIREMENT OF TWOMBLY HAS A BITE HERE, TO TAKE A
14 WORD WE'VE ALREADY USED TODAY.

15 THE COURT: YEAH.

16 MR. ASIMOW: WHEN TWO PRODUCTS THAT DO THE SAME THING
17 AND ARE SOLD THROUGH THE SAME CHANNELS ARE SUGGESTED TO BE IN A
18 DIFFERENT MARKET, THAT'S A LITTLE BIT IMPLAUSIBLE ON ITS FACE.

19 AND YOU'VE GOT TO HAVE PRETTY GOOD REASONS WHY SUCH AN
20 ALLEGATION SHOULD BE ALLOWED TO GO FORWARD, BECAUSE OTHERWISE
21 IT'S JUST TOO EASY TO ALLEGE THAT A SINGLE DEFENDANT'S PRODUCT
22 IS A MARKET TO ITSELF.

23 IT'S REALLY A CRITICAL SCREENING FOR SO MANY ANTITRUST
24 CLAIMS THAT, YOU KNOW, AS TWOMBLY ITSELF OF COURSE IS AN
25 ANTITRUST CASE AND TALKS ABOUT THE PARTICULAR EXPENSE AND

1 BURDEN OF ANTITRUST CASES THAT GO BEYOND THE PLEADING STAGE.

2 SO WHEN WE'RE STARTING FROM A PREMISE THAT IS IMPLAUSIBLE,
3 I THINK THERE IS A HEIGHTENED BURDEN, AND THAT'S WHY I WENT
4 THROUGH WHAT I THINK ARE PLAINTIFF'S FOUR REASONS TO TRY TO
5 OVERCOME WHAT'S IMPLAUSIBLE ON ITS FACE AND WHY I THINK NONE OF
6 THOSE ACTUALLY CARRY THE DAY.

7 THE COURT: OKAY. ALL RIGHT.

8 I'M GOING TO LET YOU GO ON TO THE OTHER ISSUES AND THEN
9 WE'LL HEAR FROM MR. CALLAGY ON THE PERSONAL JURISDICTION.

10 MR. ASIMOW: WELL, I THINK, YOUR HONOR, ON
11 FORECLOSURE, I THINK THE COURT DID ADDRESS THE ISSUE
12 PREVIOUSLY. THERE IS THIS QUESTION -- PLAINTIFF HAS PIVOTED ON
13 SOME OF ITS MATH BETWEEN THE FIRST AMENDED COMPLAINT AND THE
14 SECOND AMENDED COMPLAINT IN ORDER TO HELP GET A LARGER
15 FORECLOSURE, BUT I RECOGNIZE THAT PLAINTIFF HAS GROUNDED THAT
16 IN DOCUMENTS.

17 THE COURT: YEAH.

18 MR. ASIMOW: I THINK GIVEN THE -- YOU KNOW, WE WOULD,
19 IF THIS CASE GOES FORWARD, WE WILL MOST CERTAINLY TAKE ANOTHER
20 RUN AT SUMMARY JUDGMENT.

21 THE COURT: SURE, SURE.

22 MR. ASIMOW: YOU KNOW, IN ADDITION, WE HAVE THE ISSUE
23 WE DISCUSSED LAST TIME AROUND, THAT ALL OF THESE AGREEMENTS ARE
24 SHORT TERM AND EASILY TERMINABLE ON THEIR FACE, AND THE CASE
25 LAW SAYS UNLESS THERE IS SOME REASON WHY THEY DON'T MEAN WHAT

1 THEY SAY, THAT IS A COMPLETE DEFENSE.

2 BUT THE COURT LOOKED AT THAT LAST TIME, AND I DON'T WANT
3 TO REARGUE THINGS.

4 SO I THINK WITH REGARD TO FORECLOSURE, OUR POINT WOULD BE
5 WE'LL RELY ON THE MARKET DEFINITION.

6 THE COURT: OKAY.

7 MR. ASIMOW: AND WITH RESPECT TO MONOPOLIZATION, I
8 RECOGNIZE THAT THE COURT HAS, YOU KNOW, ALREADY SAID THAT IF
9 THE -- THAT IF THERE'S ENOUGH POWER HERE, THE CONDUCT COULD BE
10 EXCLUSIONARY FOR PURPOSES OF SECTION 2.

11 I'D LIKE TO POINT OUT THAT IT'S AN EVEN HIGHER MARKET
12 POWER STANDARD -- YOU KNOW, 30 OR 40 PERCENT MIGHT BE ENOUGH
13 FOR EXCLUSIVE DEALING. YOU PROBABLY NEED 60 OR 70 PERCENT FOR
14 MONOPOLIZATION. SO IT'S A MORE DIFFICULT MARKET POWER SCREEN
15 TO OVERCOME, AND IF ANY OTHER PRODUCT IS IN THE MARKET, YOU
16 DON'T HAVE ENOUGH POWER ALLEGED FOR A SECTION 2 CLAIM.

17 WITH REGARD TO THE SECOND BRAND STRATEGY, I CERTAINLY
18 AGREE WITH THE COURT THAT IT CANNOT BE ANTICOMPETITIVE TO OFFER
19 AN ALTERNATIVE LOWER COST BRAND. THAT'S BENEFICIAL TO
20 CONSUMERS. THAT LOWERS PRICES.

21 IT MAY HURT A COMPETITOR. IT MIGHT -- TEVRA MIGHT NOT
22 LIKE IT. I UNDERSTAND THAT. BUT, OF COURSE, THE ANTITRUST
23 LAWS PROTECT COMPETITION, NOT COMPETITORS, AND THIS IS A PRIME
24 EXAMPLE OF THAT.

25 AND, IN FACT, IF YOU LOOK AT THE PRODUCT IMPROVEMENT

1 CASES --

2 THE COURT: YEAH.

3 MR. ASIMOW: -- THEY CERTAINLY RECOGNIZE THAT PRODUCT
4 IMPROVEMENT CAN BE DEVASTATING TO A COMPETITOR.

5 BUT THE NINTH CIRCUIT HAS SAID SO LONG AS IT'S A GENUINE
6 PRODUCT IMPROVEMENT, THAT'S THE END OF THE ANALYSIS. GENUINE
7 NEW PRODUCT? WE'RE NOT GOING TO WEIGH HOW MUCH OF AN
8 IMPROVEMENT IS IT VERSUS HOW MUCH DOES IT HURT A COMPETITOR?

9 AND OFFERING, YOU KNOW, A DIFFERENT BRAND AT A LOWER PRICE
10 IS AN IMPROVEMENT.

11 SO I THINK THAT'S WHAT I -- THOSE WOULD BE MY COMMENTS FOR
12 YOUR HONOR ON THE FOUR ANTITRUST POINTS THAT YOU RAISED.

13 DO YOU WANT TO HEAR FROM MR. CALLAGY?

14 THE COURT: I DO, YES. LET ME HEAR FROM HIM ON
15 PERSONAL JURISDICTION SO WE'RE SURE WE'VE COVERED EVERYTHING.

16 MR. CALLAGY: THANK YOU, YOUR HONOR. AND I'LL TRY TO
17 KEEP THIS BRIEF.

18 WE HEARD YOU SAY LAST WEEK THAT PERSONAL JURISDICTION
19 MOTIONS ARE RARELY EASY, AND WE THINK THIS IS THE EXCEPTION
20 THAT SHOULD PROVE THAT RULE.

21 TEVRA HAS A BURDEN AT THIS STAGE TO NOT JUST ALLEGE, BUT
22 ALSO TO BRING FORWARD EVIDENCE SUFFICIENT TO SHOW THE EXERCISE
23 OF JURISDICTION.

24 THE COURT PERMITTED TEVRA TO TAKE JURISDICTIONAL DISCOVERY
25 IN SEARCH OF, AT THE TIME, AN ALTER EGO THEORY, WHICH IS NO

1 LONGER PRESENTED, AND AS MR. OWEN CONFIRMED AT THE OUTSET,
2 TEVRA'S SOLE BASIS FOR ALLEGING THE ABILITY TO EXERCISE
3 JURISDICTION RELATES TO THE SECOND BRAND STRATEGY.

4 MR. ASIMOW DISCUSSED WHY THAT'S PRO COMPETITIVE, OR
5 CERTAINLY TEVRA HAS NOT PLAUSIBLY ALLEGED THAT IT IS
6 ANTICOMPETITIVE.

7 I'VE JUST LOOKED OVER TEVRA'S BRIEF AGAIN. I DON'T SEE A
8 CASE SAYING OTHERWISE.

9 IN FACT, ALMOST ALL OF ITS DISCUSSION OF THE SECOND BRAND
10 STRATEGY IS TIED IN WITH ITS PERSONAL JURISDICTION DISCUSSION.

11 THE COURT: YEAH.

12 MR. CALLAGY: SO IF THE COURT FINDS AS A MATTER OF
13 LAW THAT IT'S PRO COMPETITIVE, THEN THE COURT NEED NOT REACH
14 PERSONAL JURISDICTION ISSUES.

15 THE COURT: OKAY.

16 MR. CALLAGY: BUT IF YOU DO, THEY ALSO FAIL TO SHOW
17 PURPOSEFUL DIRECTION, AND THAT'S WHAT TEVRA HAS TAKEN ON NOW IN
18 ALLEGING THAT BAYER ANIMAL HEALTH GMBH DIRECTLY TARGETED THE
19 U.S. MARKET.

20 AND THE EVIDENCE ISN'T THERE. THE EVIDENCE SHOWS THAT
21 THERE WERE DISCUSSIONS ABOUT STRATEGY, AND THE TESTIMONY BY
22 MR. ZAPATERO MAKES VERY CLEAR THAT IT WAS A MATTER FOR THE
23 SPECIFIC COUNTRY TO DEAL WITH.

24 AND, YES, THERE'S AN EXCHANGE ON THAT, AND THE EMAILS
25 TEVRA SEEMS TO BE RELYING ON INCLUDE FYI TYPE EXCHANGES, OR

1 HERE'S LESSONS WE LEARNED FROM THIS INSTANCE THAT YOU MAY
2 CONSIDER IN OTHER INSTANCES.

3 AND QUITE OFTEN IT SHOWS THE UNITED STATES INSTRUCTING
4 MANAGERS ELSEWHERE IN THE WORLD.

5 WHAT IT DOESN'T SHOW IS THE GERMAN ENTITY DIRECTING,
6 APPROVING, IMPLEMENTING, OR OVERSEEING SUCH STRATEGY. THERE'S
7 NOT AN EMAIL THAT SAYS, "MR. ZAPATERO, PLEASE TELL US WHAT TO
8 DO," OR "MR. ZAPATERO, WE NEED YOUR APPROVAL TO GO FORWARD WITH
9 THIS."

10 AND MR. ZAPATERO MADE VERY CLEAR THAT THAT WAS NOT HOW IT
11 WORKED. THEY CONSULTED WITH HIM AND HE DISCUSSED WHAT THEY
12 WERE DOING, SURE.

13 BUT IT WAS THEIR ACCOUNTABILITY, AND THE ACCOUNTABILITY
14 AND THE DECISION TO BE TAKEN LIES ON THE COUNTRY. THOSE ARE
15 HIS WORDS.

16 AND SO TEVRA HASN'T SHOWN SOMETHING TO CONTRADICT THAT,
17 AND IT IS THEREFORE AN UNREFUTED SHOWING AND THAT IS A
18 SUFFICIENT BASIS FOR THE COURT TO GRANT THE MOTION UNDER THE
19 FIRST PRONG OF THE EFFECTS TEST, WHICH IS THE FIRST PRONG OF
20 THE PERSONAL JURISDICTION TEST, NO DIRECTED ACTION.

21 AND MR. CHUA'S TESTIMONY IS NOT TO THE CONTRARY, EITHER.
22 HE -- YOU KNOW, AS TEVRA POINTED OUT, HE WORKED AT BOTH THE
23 U.S. ENTITY FOR A TIME AND THEN THE GERMAN ENTITY FOR A TIME,
24 AND SO HE WOULD KNOW.

25 AND HE WAS ASKED POINT BLANK, ARE YOU AWARE OF ANY

1 STRATEGY RELATING TO GENERIC FLEA AND TICK PRODUCTS IN THE U.S.
2 THAT WAS DIRECTED BY BAYER ANIMAL HEALTH GMBH?

3 HIS ANSWER WAS A SIMPLE NO. IT'S VERY STRAIGHTFORWARD.
4 THAT WAS CITED IN OUR BRIEF. IT'S EXHIBIT 5 TO MR. ASIMOW'S
5 DECLARATION.

6 SO THAT'S THE EVIDENCE, AND ATTORNEY ARGUMENTS AND
7 ALLEGATIONS DON'T OVERCOME THAT.

8 AND, YES, THE ALLEGATIONS PURPORT TO PARAPHRASE THE
9 EVIDENCE, BUT THEY HAVEN'T PRESENTED IT, AND WHERE WE HAVE, WE
10 HAVE SHOWN THAT IT DOESN'T MATCH UP TO THE ALLEGATION ITSELF.

11 AND SO THE EVIDENCE IS VERY STRAIGHTFORWARD AND THE COURT
12 CAN DISMISS WITH PREJUDICE ON THAT BASIS.

13 AND WE DON'T NEED TO GO TO THE SECOND OR THE THIRD
14 ELEMENTS OF THE PERSONAL JURISDICTION TEST, AND I DON'T THINK,
15 UNLESS THE COURT HAS QUESTIONS, IT'S WORTH OUR TIME TO DO SO
16 TODAY.

17 THE COURT: NO. I THINK WE'RE FINE.

18 ALL RIGHT. WELL, THANK YOU. THAT'S VERY HELPFUL.

19 MR. OWEN, I'M GOING TO TURN TO YOU, AND OBVIOUSLY WE'RE
20 GOING TO DEVOTE MOST OF OUR TIME TO RELEVANT MARKET. SO GO
21 AHEAD, PLEASE.

22 MR. OWEN: ALL RIGHT. I CAN BEGIN WHEREVER THE COURT
23 WANTS.

24 THE -- IT'S INTERESTING THAT THE COURT MENTIONED THE IDEA
25 OF CONSUMER SURVEYS AT AN EARLIER -- AT A LATER STAGE OF THE

1 CASE, BECAUSE WHAT HAPPENED BETWEEN 2011 AND 2016 WHEN BAYER IS
2 A MONOPOLIST AND IS MAKING SUCCESSIVE PRICE INCREASES TO SUCH
3 AN EXTENT THAT BY THE TIME THEY'RE DONE IN 2016, THEIR NAME
4 BRAND, ADVANTIX, WINDS UP COSTING 64 PERCENT MORE PER DOSE THAN
5 NAME BRAND FRONTLINE.

6 WHAT THEY'RE DOING DURING THOSE FIVE YEARS OF PRICE
7 INCREASES RESULTING IN THIS ENORMOUS PRICE DIFFERENTIAL BY
8 2016, THAT IS A CONSUMER SURVEY. THAT ANSWERS THE QUESTION,
9 WILL CONSUMERS SWITCH AWAY FROM ADVANTIX IN SUFFICIENT NUMBERS
10 TO RENDER THOSE PRICE INCREASES UNPROFITABLE FOR THE
11 MONOPOLIST?

12 AND, IN FACT, THE ANSWER IS NO, THEY WON'T SWITCH AWAY,
13 AND THAT BAYER WAS ABLE TO KEEP INCREASING PRICES UNTIL THEY
14 REACHED A MONOPOLY LEVEL. BY MONOPOLY LEVEL, I MEAN THIS AS
15 ALLEGED IN THE COMPLAINT, 95 PERCENT GROSS MARGIN, 71 PERCENT
16 NET MARGIN.

17 NOW, THAT ALONE IS NOT CONCLUSIVE THAT BAYER IS A
18 MONOPOLIST IN THESE -- IN THIS PARTICULAR MARKET.

19 THE COURT: UM-HUM.

20 MR. OWEN: BUT WHEN YOU COMBINE IT WITH WHAT APPEARS
21 TO BE AN 85 PERCENT MARKET SHARE OF ALL IMIDACLOPRID TOPICALS
22 THAT THEY CONTROL DIRECTLY THROUGH THEIR OWN BRAND, FOLLOWED BY
23 THE CONTROL OVER THE OTHER 15 PERCENT, WHICH WAS THAT
24 AUTHORIZED GENERIC THAT PETLOCK -- PETLOCK THAT MR. ASIMOW
25 MENTIONED, THEY CONTROL THAT, BECAUSE THEY SUED THE MAKER OF

1 PETLOCK, FORCED THEM TO AGREE TO A PATENT LICENSE AND GET
2 ROYALTIES OFF OF EVERY BOX.

3 SO YOU HAVE MULTIPLE INDICIA THAT BAYER IS A MONOPOLIST.

4 BUT THIS CASE --

5 THE COURT: I GUESS I'M GOING TO STOP YOU, MR. OWEN,
6 BECAUSE I THOUGHT MR. ASIMOW JUST SHOWED ME A DOCUMENT SHOWING
7 FRONTLINE HAS THE PRIMARY MARKET SHARE, HAS OVER -- HAS 57
8 PERCENT MARKET SHARE. I'M CONFUSED BY THAT. IT LOOKS LIKE THE
9 PRICE HAS EATEN INTO THE SALES OF ADVANTIX OVER FRONTLINE.

10 MR. OWEN: THE -- THE DOCUMENT THAT HE SHOWED YOU
11 DIDN'T HAVE ANYTHING TO DO WITH PRICES. THAT HAD AN ARBITRARY
12 MARKET DEFINITION -- I'M SORRY, YOUR HONOR. GO AHEAD.

13 THE COURT: GO AHEAD. I INTERRUPTED.

14 MR. OWEN: IT DIDN'T HAVE ANYTHING TO DO WITH PRICES.
15 IT DOESN'T HAVE ANYTHING TO DO WITH PROFITABILITY. IT DIDN'T
16 HAVE ANYTHING TO DO WITH THE LOSS OF COMPETITION TO GENERICS.

17 FRONTLINE WAS SUBJECT TO GENERIC COMPETITION FOR A LONG
18 TIME.

19 THE COURT: YEAH.

20 MR. OWEN: AND ITS PRICES WENT DOWN SIGNIFICANT LY.

21 THE COURT: OKAY.

22 MR. OWEN: ON THE OTHER HAND, AS WE ALLEGE, ADVANTIX,
23 BAYER'S NAME BRAND IMIDACLOPRID, WAS NOT SUBJECT TO GENERIC
24 COMPETITION, AND IT WENT UP -- ITS PRICES WENT UP SO MUCH OVER
25 THE PERIOD THAT WE DOCUMENT FROM 2011 TO 2016 -- AND THIS IS

1 DOCUMENTED AT SECTION A1D, ROMAN AT I, LITTLE ROMAN NUMERAL I.
2 IT'S THE FIRST OF THREE TESTS UNDER THE HYPOTHETICAL MONOPOLIST
3 TEST.

4 DURING THAT FIVE YEAR PERIOD, THE PRICES WENT UP FROM
5 BETWEEN 8 AND 17 PERCENT -- AND THIS IS THE CRITICAL POINT --
6 THOSE PRICE INCREASES WERE NOT RESTRAINED BY THE PRESENCE OF
7 FIPRONIL IN THE MARKET.

8 IF FIPRONIL WAS THE SAME PRODUCT, IF FRONTLINE WAS THE
9 SAME PRODUCT, IT WOULD NOT BE POSSIBLE FOR A MONOPOLIST LIKE
10 BAYER TO INCREASE THOSE PRICES TO A MONOPOLY LEVEL AND TO MAKE
11 THEM STICK.

12 BUT YET, THAT'S EXACTLY WHAT HAPPENED UP UNTIL 2016.

13 AND THAT ALONE SHOWS YOU THAT FIPRONIL AND ITS GENERICS
14 ARE NOT SUBSTITUTES FOR -- THEY ARE NOT STRONG SUBSTITUTES FOR
15 ADVANTIX. THEY DON'T CONSTRAIN THE PRICE INCREASES.

16 BUT HERE'S THE MORE TELLING, TELLING NUMBER, AND IT'S --
17 IT IS IN THE SECOND ROMAN AT NUMERAL, ROMAN AT II, AGAIN, IN
18 SECTION A1D. IT'S WHAT HAPPENED BY 2016 AFTER ALL THOSE PRICE
19 INCREASES OCCURRED.

20 BY THE TIME THAT HAD HAPPENED -- AND I'LL READ FROM THE
21 COMPLAINT. "AS OF 2016, K9 ADVANTIX WAS 64 PERCENT MORE
22 EXPENSIVE PER MONTHLY DOSE THAN THE FIPRONIL-BASED FRONTLINE.
23 BAYER'S OWN DOCUMENTS STATED THAT K9 ADVANTIX SOLD FOR \$21.87
24 PER DOSE, WHEREAS FRONTLINE SOLD FOR \$13.33 PER DOSE."

25 NOW, IF THOSE WERE THE SAME PRODUCTS, THAT COULD NOT

1 HAPPEN. IF THEY WERE THE SAME IN THE EYES OF CONSUMERS, TO
2 HEARKEN BACK TO THE COURT'S STATEMENT ABOUT CONSUMER SURVEYS,
3 IF THOSE WERE THE SAME, YOU SIMPLY CAN'T SELL ONE FOR 64
4 PERCENT MORE.

5 THAT IS THE SECOND OF TWO HYPOTHETICAL MONOPOLIST TESTS.

6 BUT THERE'S ANOTHER ONE COMING. IT'S ROMAN AT III IN
7 SECTION A1D, ROMAN AT III. THERE WAS A MOMENT AT WHICH BAYER'S
8 NAME BRAND IMIDACLOPRID FACED COMPETITION FROM BOTH FRONTLINE
9 AND ITS GENERICS AND FROM THE AFOREMENTIONED GENERIC
10 IMIDACLOPRID.

11 WHAT HAPPENED WHEN GENERIC IMIDACLOPRID ENTERED THE FRAY?
12 I'M GOING TO READ TO YOU FROM BAYER'S OWN DOCUMENTS. WHAT
13 HAPPENED WAS CONSUMERS SWITCHED, BUT THEY DIDN'T SWITCH FROM
14 THE IMIDACLOPRID -- I'M SORRY -- THEY DON'T SWITCH FROM
15 FIPRONIL, THEY DIDN'T SWITCH FROM FRONTLINE, THEY SWITCHED
16 ALMOST ENTIRELY FROM BAYER'S NAME BRAND.

17 I'M QUOTING A BAYER DOCUMENT THAT IS AT PARAGRAPH 52 OF
18 THE SECOND AMENDED COMPLAINT. QUOTE, "NEARLY 100 PERCENT OF
19 GENERIC SALES COMING FROM TRADE DOWN FROM ADVANTIX," THAT'S
20 BAYER'S IMIDACLOPRID NAME BRAND.

21 I'LL QUOTE AGAIN FROM THE SAME PARAGRAPH. QUOTE, "ALMOST
22 ALL OF THE GENERIC IMIDACLOPRID SALES WERE PULLED FROM
23 ADVANTAGE II," END QUOTE.

24 SO WHEN CONSUMERS HAVE AN OPPORTUNITY TO SWITCH FROM
25 GENERIC IMIDACLOPRID, THEY'RE NOT SWITCHING FROM FIPRONIL, BUT

1 THEY ARE SWITCHING FROM BAYER'S NAME BRAND PRODUCTS.

2 ALL THREE OF THOSE EXAMPLES, UNRESTRAINED PRICE INCREASES,
3 EXTREME PRICE DIFFERENTIALS SHOWING MONOPOLIST, MONOPOLY
4 PROFITS BY THE END OF THOSE PRICE INCREASES, AND SWITCHING NOT
5 FROM THE ALLEGED COMPETING PRODUCTS, FIPRONIL, BUT FROM THE
6 NAME BRAND TO THE GENERIC, ALL OF THOSE SHOW THAT THE GENERIC
7 PRODUCED BY MY CLIENT, TEVRA, AND BAYER'S NAME BRAND ARE IN THE
8 SAME MARKET AND THEY'RE IN THE SAME MARKET BY THEMSELVES.

9 YOUR HONOR, IT IS EXTREMELY COMMON FOR A CHEMICAL,
10 PESTICIDE, PHARMACEUTICAL, MOLECULE, SO TO SPEAK, TO USE PATENT
11 SPEAK, MOLECULE TO REALLY BE -- FOR THERE TO BE A SINGLE
12 COMPOUND MARKET.

13 AND I'LL MENTION SIX CASES THAT ARE ALL IN OUR BRIEF.
14 CARDIZEM, LIDODERM, AGGRENOX, ASACOL, SUBOXONE, ALL OF THESE
15 COURTS REACH EXACTLY THE SAME CONCLUSION, THAT THE PRODUCT --
16 THAT GIVEN A HYPOTHETICAL MONOPOLIST TEST ANALYSIS, THE
17 TOUCHSTONE OF WHICH IS, YOU KNOW, CROSS-ELASTICITY OF DEMAND,
18 WHEN WILL CONSUMERS SWITCH FROM ONE TO THE OTHER, THEY ALL
19 REACH THE CONCLUSION THAT IT'S THE NAME BRAND AND ITS GENERICS
20 THAT ARE ALONE IN THE MARKET.

21 AND SO --

22 THE COURT: MR. OWEN, LET ME JUST INTERRUPT HERE.

23 I REALLY APPRECIATE THAT YOU WENT BACK AND GAVE ME THE,
24 THE ANALYSIS OF THE GENERIC DRUG CASES. I HAD -- I HAD
25 DISCUSSED THAT WITH YOU LAST TIME, AND I APPRECIATED IT.

1 WHAT WAS INTERESTING TO ME WHEN I READ THOSE CASES AND
2 READ THE REPLY BRIEF WAS THAT THERE ARE SOME VERY SIGNIFICANT
3 DIFFERENCES WITH PRESCRIPTION DRUGS IN CONSUMER CHOICE AND
4 CROSS-ELASTICITY OF DEMAND.

5 AND SO IF MY DOCTOR PRESCRIBES A DRUG TO ME, I CAN'T JUST
6 GO TO MY PHARMACIST AND SAY -- OTHER THAN THE GENERIC, I CAN'T
7 SAY, "WHAT ELSE DO YOU HAVE FOR MY SYMPTOMS?" THE PHARMACIST
8 WILL SAY, "I CAN ONLY GIVE YOU WHAT YOUR DOCTOR PRESCRIBED."

9 SO I'M NOT SURE THOSE CASES REALLY HELP, ALTHOUGH I HAD
10 WANTED TO KNOW ABOUT THEM.

11 AND THEN WHEN I READ THE CASES AND READ MR. ASIMOW'S
12 ARGUMENT ON IT, I WAS PERSUADED THAT THEY'RE -- IT MAY NOT HURT
13 YOUR CASE BECAUSE, IN FACT, YOU STARTED TODAY BY BEING ABLE TO
14 GO FORWARD ON THIS MARKET, BUT I DON'T THINK IT HELPS DEFINE A
15 SINGLE PRODUCT MARKET.

16 MR. OWEN: THERE IS ANOTHER ONE, BY THE WAY, TWO DAYS
17 AGO, THE COURT -- THE MAGISTRATE DOUGLAS MILLER IN THE ZETIA
18 CASE BACK IN THE EASTERN DISTRICT OF VIRGINIA CAME OUT WITH A
19 VERY, VERY SIMILAR REPORT AND RECOMMENDATION.

20 BUT I THINK, YOUR HONOR, EVEN THOUGH THERE'S A DIFFERENCE
21 BETWEEN PRESCRIBING HUMAN PHARMACEUTICALS WHICH ARE REGULATED
22 UNDER THE FDA AND CHOOSING FLEA AND TICK MEDICATIONS, WHICH
23 MIGHT BE RECOMMENDED BY A VET OR THEY MIGHT BE OVER THE
24 COUNTER, WHICH ARE REGULATED UNDER THE EPA, EVEN THOUGH THERE'S
25 A FUNCTIONAL DIFFERENCE, I WOULD SUGGEST THAT THE HYPOTHETICAL

1 MONOPOLIST TEST IS NO DIFFERENT WHEN APPLIED TO THOSE TWO
2 THINGS.

3 CONSUMERS CAN ASK FOR DRUGS FROM THEIR DOCTORS. CONSUMERS
4 CAN CHOOSE TO BUY EITHER THE NAME BRAND OR THE GENERIC --

5 THE COURT: THAT'S CERTAINLY TRUE.

6 MR. OWEN: -- OF WHATEVER THE DOCTORS PRESCRIBE.

7 SO I DON'T THINK IT CHANGES THE MATHEMATICAL ANALYSIS.

8 THE COURT: OKAY.

9 MR. OWEN: YOUR HONOR, I'M PREPARED TO MOVE ON --

10 THE COURT: OKAY. LET'S DO THAT.

11 MR. OWEN: -- AND SAY A FEW OTHER THINGS.

12 I WANT TO ADDRESS THE COURT'S CONCERNS JUST A LITTLE BIT
13 ABOUT THE WIDE VARIETY OF THINGS THAT KILL TICKS AND FLEAS.

14 DIPPING YOUR DOG IN KEROSENE WILL KILL FLEAS AND TICKS,
15 AND IT WAS USED BY THE PIONEERS.

16 IT COMPETES -- KEROSENE COMPETES, AT LEAST IN A GENERAL
17 SENSE, WITH THE ORALS THAT ARE PRESCRIBED, IT COMPETES WITH
18 FLEA COLLARS, IT COMPETES WITH SHAMPOOS, ET CETERA, ET CETERA.

19 NAME BRAND IMIDACLOPRID COMPETES IN A GENERAL SENSE WITH
20 ALL OF THOSE THINGS. TEVRA'S GENERIC IMIDACLOPRID COMPETES
21 WITH THEM.

22 THE PROBLEM IS THAT THE WORD "COMPETE" IS WAY TOO BROAD
23 WHEN WE'RE TALKING ABOUT MONOPOLIZATION AND EXCLUSIVE DEALING.

24 EVEN THOUGH PRODUCTS COMPETE GENERALLY, IT IS STILL
25 POSSIBLE TO MONOPOLIZE ONE OF THEM. AND TO DETERMINE WHETHER

1 THAT WAS MONOPOLIZED, YOU HAVE TO DO A MATHEMATICAL INQUIRY OF
2 A HYPOTHETICAL MONOPOLIST TEST AND SEE WHETHER PRICE INCREASES
3 IN THE MONOPOLIZED PRODUCT ARE UNRESTRAINED OR NOT PREVENTED BY
4 THE OTHER PRODUCTS THAT ARE ALLEGEDLY IN THE MARKET.

5 IT IS NOT POSSIBLE TO MONOPOLIZE ANYTHING IN ORDER TO EARN
6 MONOPOLY LEVEL PROFITS IF CONSUMERS WILL JUST SWITCH TO
7 SOMETHING THEY CONSIDER THE SAME. AS WE TELL YOU IN SECTION
8 A1D, THAT'S NOT WHAT HAPPENED HERE ACCORDING TO BAYER'S OWN
9 DOCUMENTS.

10 I THINK I SHOULD MOVE ON.

11 I DO WANT TO POINT OUT A COUPLE OF MISTAKES THAT I BELIEVE
12 BAYER HAS MADE IN MISCHARACTERIZING THE HYPOTHETICAL MONOPOLIST
13 TEST.

14 THEY'VE SUGGESTED TO YOU THAT A SSNIP CAN ONLY BE A SINGLE
15 PRICE INCREASE. THERE IS NO SUCH REQUIREMENT.

16 IN THEIR BRIEF, THEY DO SOMETHING MORE SERIOUS. THEY
17 SUGGEST THAT IT HAS TO BE AN ANNUAL PRICE INCREASE, AND THERE
18 IS NO SUCH REQUIREMENT THERE.

19 IN ANY EVENT, I THINK THAT THE MAGNITUDE OF THE PRICE
20 INCREASE THAT IS, THAT IS SHOWN IN THE FIRST HYPOTHETICAL
21 MONOPOLIST TEST IN OUR SECOND AMENDED COMPLAINT IS MORE THAN
22 ENOUGH TO DEMONSTRATE THAT IT'S A GOOD DATA POINT.

23 THE COURT: SO YOU BELIEVE THE SIXTH CIRCUIT WAS
24 INCORRECT IN THE KENTUCKY SPEEDWAY CASE --

25 MR. OWEN: THE --

1 THE COURT: -- ON THE NINTH CIRCUIT LAW?

2 MR. OWEN: I BELIEVE THE KENTUCKY SPEEDWAY CASE HAS
3 NO APPLICATION AT ALL BECAUSE THE, THE EXPERT WHOSE REPORT WAS
4 STRUCK ON DAUBERT DIDN'T PROPERLY APPLY THE HYPOTHETICAL
5 MONOPOLIST TEST AT ALL.

6 HE MADE UP HIS OWN WAS THE CRUX OF KENTUCKY SPEEDWAY.

7 THE COURT: I THINK THE CRUX OF MR. ASIMOW'S ARGUMENT
8 MAY BE THAT YOU'RE MAKING UP YOUR OWN AS WELL, SO --

9 MR. OWEN: WELL, I AM HOPEFUL THAT THE COURT WILL
10 HAVE AN OPPORTUNITY TO EVALUATE THE WELL COMPENSATED AND HIGHLY
11 CREDENTIALLED EXPERTS THAT MR. ASIMOW AND I WILL BRING AT A
12 LATER STAGE. I'M HOPEFUL THAT WE'LL GET THE OPPORTUNITY TO DO
13 THAT.

14 THE COURT: I UNDERSTAND.

15 MR. OWEN: ALL RIGHT. I'M GOING TO MOVE ON TO SECOND
16 BRAND STRATEGY UNLESS THE COURT WANTS TO HEAR ANYTHING FURTHER.

17 THE COURT: LET'S MOVE ON.

18 MR. OWEN: ALL RIGHT. I AM GOING TO TRY TO CALL UP
19 MY SLIDE SHOW HERE.

20 THE COURT: OKAY. AND TIFFANY CAN GIVE YOU THAT.

21 MR. OWEN: SO I'LL SHARE MY SCREEN.

22 THE COURT: YEAH.

23 THE CLERK: GO AHEAD.

24 MR. OWEN: AND I'M GOING TO EXPLAIN WHY -- LET'S SEE.
25 IF I NOW PUSH THIS SHARE BUTTON, IT SHOULD SHARE THE SCREEN.

1 AND IT DID.

2 CAN EVERYONE -- CAN THE COURT SEE THAT?

3 THE COURT: YES, I CAN. THANK YOU.

4 MR. OWEN: WHY DO I THINK THAT THE SECOND BRAND
5 STRATEGY IS ANTICOMPETITIVE?

6 BECAUSE WHAT THE COURT IS LOOKING AT HERE IS EXHIBIT 1,
7 EXHIBIT 1 THAT WAS USED IN THE DEPOSITIONS.

8 OF COURSE MR. CHUA AND MR. ZAPATERO DENY THAT THERE WAS
9 ANY DIRECTION FROM, FROM GERMANY TO THE UNITED STATES. OF
10 COURSE THEY DO.

11 IN FACT, THEY DID IT ON EXAMINATION BY MR. CALLAGY, WHO
12 ASKED THEM THESE DIRECT EXAMINATION QUESTIONS THAT HE'S QUOTED
13 THE COURT TODAY.

14 WE BEG TO DIFFER, AND WE BEG TO DIFFER BASED ON THE
15 DOCUMENTS.

16 HERE'S ONE OF THE DOCUMENTS. THIS DOCUMENT WAS NOT
17 CREATED BY ME OR ANYONE ASSOCIATED WITH THE PLAINTIFF IN THIS
18 CASE. THIS DOCUMENT WAS CREATED BY BAYER, AND YOU CAN SEE
19 WHERE I'M HIGHLIGHTING NOW WHAT BAYER'S STATED GOALS WERE.

20 BAYER'S STATED GOALS INCLUDED THE FOLLOWING: BLOCK
21 GENERIC ENTRY.

22 NOW, WHAT WERE THEY GOING TO DO TO BLOCK GENERIC ENTRY?
23 HOW ABOUT A SECOND BRAND STRATEGY?

24 WHY DO I THINK THAT THEY USED THE SECOND BRAND STRATEGY TO
25 BLOCK GENERIC ENTRY? WELL, THAT HAS TO DO WITH SLIDE NUMBER 2.

1 HERE'S SLIDE NUMBER 2 IN EXHIBIT 1, AND YOU'RE GOING TO
2 SEE -- EXCUSE ME -- YOU'RE GOING TO SEE WHAT BAYER DID TO TRY
3 TO BLOCK GENERIC ENTRY: BLOCK GENERIC ENTRY BY USING
4 DEFENSECARE AS A GENERIC BRAND.

5 AND THAT IS EXACTLY WHAT THEY DID AT PETSMART AND THEY
6 CONGRATULATED THEMSELVES FOR DOING THAT, AND IT WAS THE
7 GERMAN -- AS WE'LL SEE LATER ON WHEN WE TAKE A LOOK AT
8 SECTION F OF THE COMPLAINT, THE GERMAN COMPANY CAME UP WITH THE
9 STRATEGY, OVERSAW IT BEING DONE IN THE UNITED STATES, AND THEN
10 CONGRATULATED ITSELF FOR IT HAVING WORKED IN THE UNITED STATES
11 OF AMERICA. THAT, WE CONTEND, IS PURPOSEFUL DIRECTION.

12 LET ME SHOW YOU SOMETHING ELSE THAT BAYER DID. THERE IS
13 ANOTHER BAYER -- ANOTHER BAYER --

14 THE COURT: WELL, I GUESS -- MR. OWEN, IF I COULD
15 STOP YOU HERE?

16 MR. OWEN: SURE.

17 THE COURT: I'M JUST CONCERNED THAT YOU'RE DRIFTING
18 INTO HARM TO A COMPETITOR VERSUS HARM TO COMPETITION.

19 AND SO, YOU KNOW, THAT'S -- YES, I -- SURE, I MEAN,
20 ANYTHING THAT BAYER DOES TO HURT TEVRA'S CHANCES OF GETTING IN
21 THE MARKET HARMS A COMPETITOR.

22 BUT IT -- I'M FOCUSSED, UNDER THE ANTITRUST LAWS, ON HARM
23 TO COMPETITION, MEANING THE CONSUMERS.

24 MR. OWEN: WELL, THERE WAS HARM TO COMPETITION
25 BECAUSE BAYER USED THIS IN ORDER TO KEEP THEIR PRICES AT

1 MONOPOLY LEVELS. THAT'S THE WHOLE CRUX OF OUR SECOND AMENDED
2 COMPLAINT.

3 THE COURT: THERE'S NO CASE AUTHORITY THAT SUPPORTS
4 THIS THEORY AT ALL. YOU'VE GIVEN ME NOTHING BUT ACADEMIC
5 ARTICLES.

6 MR. OWEN: THAT BAYER WAS AT MONOPOLY LEVELS, OR THAT
7 THEY USED --

8 THE COURT: WELL, THAT THE SECOND BRAND STRATEGY IS
9 ANTICOMPETITIVE, AS OPPOSED TO MR. ASIMOW'S ARGUMENT THAT IT'S
10 PRO COMPETITIVE AS A MATTER OF LAW.

11 MR. OWEN: I THINK BAYER'S OWN DOCUMENTS CALL IT
12 ANTICOMPETITIVE. IT'S NOT COMPETING WITH GENERICS THAT THEY'RE
13 DOING. IT'S BLOCKING THEIR ENTRY INTO THE MARKET. HOW IS THAT
14 NOT ANTICOMPETITIVE ON ITS FACE? IT'S ONE THING TO COMPETE.
15 IT'S ANOTHER THING TO BLOCK ENTRY.

16 AND BAYER'S DOCUMENTS, AS WE QUOTE IN THE SECOND AMENDED
17 COMPLAINT -- I'M ONLY SHOWING A SUBSET OF THEM -- ARE RIFE WITH
18 THE IDEA THAT WE'VE GOT TO KEEP COMPETITORS OUT OF THE MARKET,
19 WE'VE GOT TO BLOCK GENERIC ENTRY.

20 THE DOCUMENT THAT I'M ABOUT TO SHOW IS YET ANOTHER EXAMPLE
21 OF BLOCKING GENERIC ENTRY. WHEN THEY WENT AND CONDUCTED WHAT
22 THEY CALLED A DISTRIBUTOR RETAILER SUMMIT, THEY WENT TO THE
23 DISTRIBUTORS AND RETAILERS, AND WHAT DID THEY ASK OF THEM?
24 WHAT WAS THEIR ASK OF THE CUSTOMER? IT WAS GAIN SUPPORT TO
25 BLOCK GENERIC ENTRY.

1 SO THEY'RE NOT ONLY SETTING OUT TO DO IT, THEY'RE REACHING
2 OUT TO RETAILERS TO DO IT.

3 FURTHERMORE, WHAT HAPPENED WHEN GENERICS ACTUALLY MADE IT
4 ON TO THE RETAILER'S SHELF?

5 WELL, YOU CAN SEE THAT DETAILED AT SECTION E3 OF THE
6 COMPLAINT. BAYER BOUGHT THOSE GENERICS OFF THE RETAILER'S
7 SHELF, PAID PETCO \$400,000 TO DO IT, ALSO GOT THEM OFF THE
8 SHELVES AT -- ALSO GOT THEM OFF THE SHELVES AT PETSMART, AND
9 IMMEDIATELY AFTER THEY DID THAT, IMMEDIATELY IN THE SAME
10 DOCUMENT THAT YOU SEE QUOTED IN SECTION E3 OF THE COMPLAINT,
11 THEY RAISED THE PRICE OF THE NAME BRAND.

12 NOW, THAT'S HARM TO CONSUMERS. THAT'S HARM TO THE MARKET,
13 NOT JUST HARM TO A COMPETITOR. THAT'S HARM TO COMPETITION.

14 YOU CAN'T FIND A DOCUMENT --

15 THE COURT: MR. OWEN, IT SEEMS TO ME THAT YOU ARE
16 CONCEDING THAT NO COURT HAS EVER CONDONED THIS SECOND BRAND
17 THEORY AS ANTICOMPETITIVE.

18 MR. OWEN: WELL, WE DIDN'T CITE A CASE DIRECTLY ON
19 THE SECOND BRANDS.

20 THE COURT: I DON'T THINK YOU CITED A CASE EVEN
21 REMOTELY ON THE SECOND BRAND.

22 MR. OWEN: YEAH. WHEN -- BUT THE IDEA OF KEEPING
23 GENERIC COMPETITION OUT BY WHATEVER MEANS RUNS THROUGH THE
24 ENTIRE LINES OF CASE LAW WE CITED WITH ALL THOSE PHARMACEUTICAL
25 CASES.

1 THE IDEA OF KEEPING GENERIC COMPETITION OUT SO THAT YOU
2 CAN MAINTAIN THOSE MONOPOLY PRICES THAT WE'VE DOCUMENTED RUNS
3 THROUGH EVERYTHING.

4 WHAT DOES IT MATTER WHETHER IT WAS BECAUSE OF INJECTING
5 SECOND BRANDS OR PAYING BRIBES OR CHANGING CONTRACTS TO ENGAGE
6 IN EXCLUSIVE DEALING? WHAT DOES IT MATTER? IF THE OBJECT WAS
7 TO BLOCK GENERIC ENTRY AND IT SUCCEEDED, HOW IS THAT NOT
8 COMPETITIVE, ESPECIALLY AT THE PLEADING STAGE?

9 THE COURT: UM-HUM.

10 MR. OWEN: NOW, IF THEY HAVE AN EXPERT THAT
11 DEMONSTRATES IT'S PRO COMPETITIVE, IF THIS COMES BACK TO YOU AT
12 THE S.J. STAGE AND THERE'S INDICIA THAT IT WAS PRO COMPETITIVE,
13 THAT IT LOWERS PRICES FOR CONSUMERS, IT DIDN'T. IT DIDN'T
14 LOWER PRICES. IN FACT, IT RAISED THEM.

15 YOUR HONOR, IF YOU WANT TO SEE THEM RAISE PRICES, TAKE A
16 LOOK AT SECTION E3 OF THE COMPLAINT. I'LL GIVE YOU THE
17 PARAGRAPH. AND, IN FACT, I CAN BRING IT UP ON THE SCREEN IF
18 THE COURT WOULD PREFER.

19 I'M GOING TO SHOW YOU A DOCUMENT -- NOW, BY THE WAY --

20 THE COURT: IF YOU COULD GIVE ME THE PARAGRAPH
21 NUMBER, THAT'S A BIG HELP.

22 MR. OWEN: YEAH. IT HAPPENS TO BE AT PARAGRAPH 158.

23 THE COURT: OKAY.

24 MR. OWEN: NOW, THIS -- THIS IS A DOCUMENT THAT IS, I
25 THINK, MARKED HIGHLY CONFIDENTIAL. IT'S REDACTED OUT OF THE

1 SECOND AMENDED COMPLAINT. I'M CALLING MR. ASIMOW'S ATTENTION
2 TO THAT.

3 THE COURT: WHY DON'T YOU -- MR. OWEN, I MIGHT BE
4 ABLE TO LOOK AT THE HARD COPY SO THAT WE DON'T NEED TO WORRY
5 ABOUT IT.

6 TELL ME, WHERE AM I GOING TO FIND -- THIS IS IN OUR
7 OPPOSITION PAPERS?

8 MR. OWEN: YES. NO, IT'S PARAGRAPH 158 OF THE SECOND
9 AMENDED COMPLAINT.

10 THE COURT: OH, LET ME -- OKAY. LET ME -- I'VE GOT A
11 LOT OF PAPER HERE. LET ME FIND THE SECOND AMENDED COMPLAINT.

12 HERE WE GO. AND PARAGRAPH 158?

13 MR. OWEN: YEAH.

14 THE COURT: OKAY.

15 MR. OWEN: AND IT REALLY RUNS PARAGRAPHS -- THE
16 ENTIRE ALLEGATION RUNS PARAGRAPHS 155 TO 158. IT ONLY RUNS
17 ABOUT A HALF A PAGE.

18 THE COURT: OKAY.

19 MR. OWEN: YOU CAN BARELY READ IT. IT LOOKS LIKE A
20 CIA DOCUMENT SO MUCH HAS BEEN REDACTED.

21 THE COURT: SO I -- GIVE ME JUST ONE SECOND TO READ
22 THIS. THAT WAY YOU DON'T NEED TO PUT IT UP ON THE SCREEN.

23 MR. OWEN: SURE.

24 (PAUSE IN PROCEEDINGS.)

25 THE COURT: OKAY. SO WE'VE MOVED -- BUT THIS IS NOT

1 THE SECOND BRAND STRATEGY, THESE ALLEGATIONS. THIS IS A
2 DIFFERENT CLAIM ON FORECLOSURE, ISN'T IT?

3 MR. OWEN: THAT IS CORRECT, YOUR HONOR.

4 THE COURT: OKAY.

5 MR. OWEN: THIS IS INDEPENDENT OF THE SECOND BRAND
6 STRATEGY.

7 THE COURT: AND JUST SO THAT WE'RE CLEAR, I WAS NOT
8 INCLINED TO REVISIT MY PRIOR RULING ON FORECLOSURE WHERE I WAS
9 ALLOWING IT TO GO FORWARD.

10 MR. OWEN: OKAY. I -- THE ONLY -- THE REASON I POINT
11 THE COURT TO THAT IS IT SIMPLY SHOWS THE LENGTHY DESIRE OF
12 BAYER TO GET THE GENERICS OFF THE SHELF, AND THE LENGTHS THAT
13 IT WOULD GO TO, AND THE FACT THAT ONCE IT GOT THOSE GENERICS
14 OFF THE SHELF, IT IMMEDIATELY RAISED THE PRICE -- THAT'S WHAT
15 YOU SEE IN 158 -- AND --

16 THE COURT: I GUESS -- I'M JUST NOT SURE THAT I'M
17 WILLING TO TAKE THOSE ARGUMENTS, WHICH I HAVE ALREADY APPROVED
18 TO GO FORWARD TO DEVELOPMENT OF EVIDENCE ON FORECLOSURE, TO
19 COLOR WHAT I THINK IS A LEGAL THEORY -- IS YOUR THEORY WITHOUT
20 ANY SUPPORT IN THE CASE LAW ON THE INTRODUCTION OF A SECOND
21 BRAND AS BEING ANTICOMPETITIVE BECAUSE THE SECOND BRAND COSTS
22 LESS MONEY THAN THE NAME BRAND.

23 AND SO, YOU KNOW, YOUR ACADEMIC RESEARCH ON THE EFFECT OF
24 A SPONSORED BRAND BY THE NAME BRAND COMPANY FINDS NO BASIS IN
25 THE LAW AT THIS POINT.

1 I MEAN, YOU CAN SAY TO ME, LET'S CREATE NEW LAW, BUT
2 ANTITRUST LAW HAS BEEN FROZEN FOR 30 YEARS. IT'S MAYBE THE
3 ONLY THING THAT ISN'T THAWING IN OUR WORLD RIGHT NOW.

4 MR. OWEN: YOUR HONOR, IF THIS IS THE FIRST CASE,
5 IT'S STILL A VALID ARGUMENT.

6 THE COURT: WELL --

7 MR. OWEN: IF THIS IS THE FIRST CASE EVER, THE FACT
8 THAT YOU HAVE ALL THESE DOCUMENTS THAT ARE QUOTED -- AND
9 THEY'RE QUOTED EXTENSIVELY AT SECTION F OF THE SECOND AMENDED
10 COMPLAINT -- THAT SAY, LET'S BRING IN A SECOND BRAND AS A
11 GENERIC DEFENSE STRATEGY, THEY TALK ABOUT THE ANTI-GENERIC
12 EFFECT OF IT, THEY TALK ABOUT IT'S OUR BUFFER AGAINST GENERIC
13 COMPETITION.

14 IF THIS IS THE FIRST CASE, THEN SO BE IT.

15 THE REASON ACADEMICS THAT WE QUOTED ARE TALKING ABOUT IT
16 IS BECAUSE IT'S REAL, IS BECAUSE IT'S A WAY TO BLOCK
17 COMPETITION.

18 NOW, IT'S NOT HARMLESS --

19 THE COURT: WELL, BUT THE PROBLEM IS THE THEORY MAY
20 BE -- IT'S A BLACK AND WHITE THEORY, BECAUSE IF I BUY WHAT
21 YOU'RE SAYING, THEN NO COMPANY COULD INTRODUCE A GENERIC. IT
22 WOULD BE -- IT'S EITHER IN OR OUT.

23 TO THEN HAVE TO EVALUATE, WELL, THIS SECOND BRAND IS PRO
24 COMPETITIVE AND THIS ONE IS ANTICOMPETITIVE, THAT BECOMES AN
25 IMPOSSIBLE JOB. THEN COURTS ARE RUNNING BUSINESSES IN A WAY

1 THAT THE COURTS HAVE DECLINED TO DO IN THE ANTITRUST FIELD, I
2 THINK.

3 MR. OWEN: I RESPECTFULLY DISAGREE, YOUR HONOR. IT'S
4 NOT BLACK AND WHITE.

5 THE QUESTION OF A SECOND BRAND COMING IN IS TWO-FOLD.
6 NUMBER ONE, WAS IT DONE FOR THE EXPRESS PURPOSE OF BLOCKING
7 GENERIC COMPETITION, AS OPPOSED TO JUST GIVING A CHEAPER
8 ALTERNATIVE TO CONSUMERS; AND, TWO, AND MOST IMPORTANTLY, DID
9 IT BLOCK GENERIC COMPETITION AND ALLOW THE MONOPOLIST TO
10 CONTINUE TO RAISE PRICES TO A MONOPOLY LEVEL?

11 THE SECOND AMENDED COMPLAINT IN FRONT OF YOU CLEARLY
12 ALLEGES THAT BOTH OF THOSE THINGS HAPPENED.

13 SO 20 YEARS FROM NOW, WHEN A SECOND BRAND CASE GETS THROWN
14 OUT, THEY CAN SAY, THEY DIDN'T HAVE THE EVIDENCE THAT
15 JUDGE FREEMAN CONSIDERED WAY BACK 20 YEARS AGO IN THE TEVRA
16 CASE.

17 SO I DON'T -- IF THIS IS THE FIRST TIME EVER, IT'S THE
18 FIRST TIME EVER. BUT IT DOES STATE -- WE THINK IT STATES A
19 CLAIM.

20 THE COURT: I GUESS ONE OF THE PROBLEMS I HAVE IS
21 THAT ANY COMPANY, INCLUDING TEVRA, IS GOING TO WANT TO
22 INTRODUCE ITS PRODUCTS AT THE HIGHEST PRICE THE MARKET WILL
23 BEAR. THAT'S THE WHOLE POINT.

24 AND SO THAT'S WHERE WE GET INTO THIS VERY DIFFICULT
25 ANALYSIS IS THAT YOU'RE SAYING, BUT IF THE NAME BRAND

1 INTRODUCES A GENERIC, IT CAN'T INTRODUCE IT AT THE HIGHEST
2 PRICE THE MARKET WILL BEAR BECAUSE THAT WOULD BE
3 ANTICOMPETITIVE, SO THEN IT HAS TO GO TO SOME LOWER PRICE.

4 I GUESS I'M JUST NOT BUYING THE PREMISE.

5 MR. OWEN: WELL, I UNDERSTAND, YOUR HONOR.

6 IF -- I WILL -- I MEAN, I WOULD CONCEDE, IF THE NAME BRAND
7 INTRODUCES A GENERIC THAT'S A LOWER PRICED ALTERNATIVE FOR
8 EVERYONE, THAT ON NET, THEN IT COULD BE PRO COMPETITIVE.

9 BUT IF ITS PURPOSE IS TO BE ABLE TO MAINTAIN THAT
10 EXTREMELY HIGH PRICE, THE MONOPOLIST PRICE THAT WE'VE
11 DOCUMENTED IN THE SECOND AMENDED COMPLAINT, THEN IT IS
12 ANTICOMPETITIVE.

13 HERE'S THE WAY YOU SHOULD REALLY --

14 THE COURT: WELL, AND I CERTAINLY UNDERSTAND THAT IN
15 OTHER -- I MEAN, THAT'S NOT THE ISSUE HERE, BUT ONE CAN BE
16 ANTI -- CAN BE A MONOPOLIST BY LOWERING ONE'S PRICES, WHICH
17 HELPS THE CONSUMER IN THE SHORT TERM, AS A WAY OF GETTING RID
18 OF THE COMPETITION AND THEN COMING IN WITH THE MONOPOLY POWER
19 AND INCREASING. I UNDERSTAND THAT.

20 MR. OWEN: I WOULD ALSO URGE THE COURT TO VIEW --
21 JUST AS I'M URGING THE COURT TO VIEW THE ALLEGATIONS ABOUT
22 SECOND BRANDS THAT ARE CONTAINED IN SECTION E1 THROUGH THE LENS
23 OF SECTION E3 WHERE THEY BOUGHT THE GENERICS OFF THE SHELF AND
24 THEN RAISED THE PRICE, I'M ALSO GOING TO URGE THE COURT TO VIEW
25 THE SECOND BRAND STRATEGY IN SECTION E1 THROUGH THE LENS OF

1 SECTION E2.

2 WHAT IS E2? WELL, THOSE ARE THE ALLEGATIONS THAT THE
3 COURT SAW THE FIRST TIME IN THE FIRST AMENDED COMPLAINT WHERE
4 MULTIPLE DISTRIBUTORS AND RETAILERS SAID THEY COULDN'T CARRY
5 IT.

6 HOWEVER, SECTION E2 HAS SOMETHING NEW IN IT THAT WE DIDN'T
7 HAVE THE FIRST TIME BECAUSE WE DIDN'T HAVE ANY DOCUMENTS.

8 SECTION E2 HAS A VERY IMPORTANT ARGUMENT THAT BAYER MADE
9 TO THE RETAILERS. THEY WENT -- AND IT'S FLESHED OUT THROUGH
10 THE DOCUMENTS. THEY'RE QUOTED IN THERE. BAYER WENT TO THE
11 RETAILERS AND SAID TO THEM, "GET THE GENERICS OFF THE SHELF AND
12 WE CAN ALL MAKE MORE MONEY, BECAUSE EVEN THOUGH THE PROFIT
13 MARGIN YOU MAKE ON THE GENERICS IS HIGHER, THE TOTAL DOLLARS
14 YOU CAN GET FROM SELLING THE NAME BRAND AT A HIGHER PRICE WILL
15 PUT MORE MONEY IN YOUR POCKET. BUT THE EXPLICIT CONDITION OF
16 THAT DEAL IS TO GET THOSE GENERICS OFF THE SHELF."

17 SO VIEW IT THROUGH THAT LENS WHEN BAYER GOES TO THE
18 RETAILERS AND SAID, "LET'S KEEP THE PRICE OF THE MONOPOLY
19 PRODUCT HIGH, BUT YOU HAVE TO GET THE GENERICS OFF THE SHELF SO
20 THERE'S NO DOWNWARD PRICE PRESSURE ON IT, WE CAN ALL MAKE MORE
21 MONEY."

22 I MEAN, THAT'S A NAKED, IN OUR VIEW, VIOLATION.

23 AND LOOK AT THE GENERIC -- THE SECOND BRAND STRATEGY
24 THROUGH THAT LENS BECAUSE IT'S THE SAME MONOPOLISTS TALKING TO
25 THE SAME RETAILERS FOR THE SAME GOAL AS TO BLOCK GENERIC ENTRY.

1 IS THERE ANYTHING ELSE THE COURT IS CURIOUS ABOUT ON THE
2 SECOND BRAND STRATEGY?

3 THE COURT: NO. WE CAN MOVE ON.

4 MR. OWEN: OKAY. LET'S MOVE ON TO THE, TO THE
5 ALLEGATIONS REGARDING WHAT WE BELIEVE ARE PURPOSEFUL DIRECTION
6 OF THE, OF THE SECOND BRAND STRATEGY FROM BAYER ANIMAL, THE
7 BAYER ANIMAL HEALTH GMBH, THAT I MAY JUST REFER TO AS GMBH, THE
8 GERMAN ENTITY TO THE UNITED STATES.

9 I WON'T BELABOR THE POINT. I COULD SIMPLY READ THINGS
10 INTO THE RECORD, BUT THEY'RE ALL DETAILED AT SECTION F OF THE
11 SECOND AMENDED COMPLAINT.

12 WE QUOTE NO FEWER THAN NINE DIFFERENT BAYER DOCUMENTS FROM
13 THE YEAR 2013, RIGHT UP TO THE YEAR 2019, IN WHICH BAYER --
14 BAYER'S GERMAN EXECUTIVES, WHICH AT ONE POINT INCLUDE
15 JERIEL CHUA, ARE SUGGESTING THIS SECOND BRAND STRATEGY, THEY'RE
16 GUIDING THE SECOND BRAND STRATEGY, AND ULTIMATELY THEY'RE
17 CROWING ABOUT THE SUCCESS OF THE SECOND BRAND STRATEGY. YOU
18 CAN SEE THIS BETWEEN PARAGRAPHS 181 AND 190.

19 NOTICE THE TITLES OF SOME OF THE PEOPLE THAT ARE SAYING
20 THIS. FRANK RAUTENBERG IS WHAT IS KNOWN AS THE, QUOTE, "GLOBAL
21 PRICING EXCELLENCE MANAGER," PARAGRAPH 185, WHO IS IMPLEMENTING
22 WHAT IS CALLED GLOBAL PRICE GOVERNANCE, AND HE TELLS HIS
23 EXECUTIVES, INCLUDING U.S. EXECUTIVES, SOONER OR LATER, THE
24 PATENT PROTECTION OF ADVANTIX WILL EXPIRE. FROM THE EXPERIENCE
25 OF OTHER BRANDS, WE CAN ASSUME THAT PROVIDERS OF GENERICS WILL

1 ENTER THE MARKET AT A SIGNIFICANT PRICE GAP TO ADVANTIX. THIS
2 IS A HUGE THREAT TO OUR SALES AND PROFITABILITY.

3 AND THE DOCUMENTS CONTINUE. THEY REQUIRE THE
4 UNITED STATES TO REPORT ON WHAT IS KNOWN AS, QUOTE, "THE
5 LIKELIHOOD OF GENERICS ENTERING THE MARKET." THEY CONTROL THE
6 ENTIRE PROCESS BY SOMETHING THAT IS KNOWN AS STRACO,
7 S-T-R-A-C-O.

8 NOW, IT IS A VERY PRECISE SERIES OF TEMPLATES AND
9 SPREADSHEETS THAT HAVE TO BE REPORTED BY EACH COUNTRY TO THE
10 GERMAN PARENT EVERY YEAR. THE STRACO PROCESS REQUIRES EACH
11 COUNTRY, INCLUDING THE UNITED STATES, TO PUT TOGETHER DETAILED
12 LISTS OF WHEN THEIR PRODUCTS FACE GENERIC COMPETITION AND WHAT
13 THEY'RE GOING TO DO ABOUT IT.

14 AT PARAGRAPH 187, YOU HAVE ANOTHER SERIES OF DOCUMENTS
15 TALKING ABOUT GENERIC DEFENSE STRATEGY, INCLUDING SECOND
16 BRANDS. THAT'S A MEETING ITEM, INCLUDING U.S. EXECUTIVES IN
17 GERMANY, OF WHAT IS CALLED THE GLOBAL BRAND TEAM.

18 NOW, THIS IS SIMPLY NOT THE PASSIVE OBSERVER OR GENERAL
19 ADVICE THAT MR. CALLAGY WOULD HAVE YOU BELIEVE. THIS IS ACTIVE
20 INVOLVEMENT IN THE SECOND BRAND'S STRATEGY IN THE
21 UNITED STATES, SO I THINK IT MEETS THE PURPOSEFUL DIRECTION --
22 PURPOSEFUL DIRECTION PRONG.

23 YOU HAVE PEOPLE LIKE IMKE ROTTMAN, WHO'S LATER KNOWN AS
24 IMKE PICKARDT, WRITING IN -- WRITING ABOUT SECOND BRAND
25 STRATEGY. NOW, SHE'S A GERMAN EXECUTIVE FROM GMBH AND SHE'S

1 WRITING THAT WE NEED TO TALK ABOUT, QUOTE, "GROSS NET PRICE
2 STRATEGY SHOULD INCLUDE STABLE PRICES FOR THE BRAND AFTER
3 GENERIC ENTRY AND SECOND BRAND PRIVATE LABEL LAUNCH."

4 BY 2019, JERIEL CHUA, WHO WAS MENTIONED EARLIER, HE'S
5 ACTUALLY MOVED FROM THE U.S. ENTITY TO THE GERMAN ENTITY, AND
6 HE WRITES A SELF-CONGRATULATORY LETTER. HE WRITES EMAILS THAT
7 INCLUDE SLIDE DECKS ABOUT HOW THE U.S. IMPLEMENTED ITS SECOND
8 BRAND STRATEGY, AND HE WRITES A SELF-CONGRATULATORY LETTER
9 ABOUT THE U.S. EXPERIENCE WITH THE SECOND BRAND DEFENSECARE
10 WHICH WAS SUCCESSFULLY DEPLOYED AT PETSMART.

11 NONE OF THIS IS PASSIVE. NONE OF THIS IS SIMPLY
12 REPORTING. ALL OF THIS IS ACTIVE INVOLVEMENT AND PURPOSEFUL
13 DIRECTION BY THE GERMAN ENTITY.

14 DOES THE COURT HAVE ANY QUESTIONS FOR ME ABOUT ANY OF
15 THAT?

16 THE COURT: (SHAKES HEAD FROM SIDE TO SIDE.)

17 MR. OWEN: I BELIEVE I'VE LOST YOUR AUDIO.

18 THE COURT: NO, I DON'T HAVE ANY QUESTIONS. THANK
19 YOU.

20 MR. OWEN: YOUR HONOR, I APPRECIATE THE COURT'S TIME.
21 I'M HAPPY TO ANSWER ANY QUESTIONS ABOUT ANY ASPECT OF THE CASE.

22 I THINK WE'VE TOUCHED ON YOUR MARKET ISSUES, THE SECOND
23 BRAND ISSUES, THE ISSUES REGARDING THE GERMAN ENTITY.

24 I DON'T ASSUME THE COURT HAS ANY QUESTIONS FOR ME ABOUT
25 EITHER THE FORECLOSURE ANALYSIS OR MONOPOLY POWER, BUT I'D BE

1 HAPPY TO ANSWER THEM IF THE COURT DOES.

2 THE COURT: OKAY. NO, THANK YOU.

3 I WOULD LIKE TO RETURN TO MR. ASIMOW ON THE SECOND BRAND
4 STRATEGY.

5 MR. ASIMOW, I MADE SOME COMMENTS, AND I MIGHT HAVE BEEN
6 WAY OUT IN LEFT FIELD. YOU NEVER WANT A JUDGE DOING THAT.

7 BUT I DO THINK THAT MR. OWEN RAISES SOME REALLY
8 INTERESTING ISSUES, AND THEY MAY ONLY BE IN THE CATEGORY OF
9 INTERESTING ECONOMIC ISSUES AND NOT LEGAL ISSUES HERE, AND
10 SINCE WE'RE NOT SITTING AROUND A COFFEE TABLE, THEY WOULDN'T BE
11 PARTICULARLY RELEVANT.

12 BUT I -- YOU'RE THE EXPERT HERE AND NOT ME.

13 MR. ASIMOW: WELL, YOU'RE THE ONE THAT MATTERS, YOUR
14 HONOR.

15 BUT LET ME RESPOND TO SOME OF THE COMMENTS THERE THAT
16 MR. OWEN MADE.

17 THE ALLIED ORTHOPEDIC CASE IN THE NINTH CIRCUIT IS OUR
18 CONTROLLING AUTHORITY ABOUT PRODUCT IMPROVEMENTS, AND IT MAKES
19 THE POINT THAT WE REALLY DO NOT WANT TO CHILL PEOPLE FROM
20 IMPROVING THEIR PRODUCT, AND ONE VERY IMPORTANT ELEMENT IS
21 LOWER PRICES FOR OFFERING AN ADDITIONAL PRODUCT AT LOWER PRICES
22 ON ITS FACE IS GOING TO BE A BENEFIT TO CONSUMERS.

23 AND SO THAT CASE TELLS US THERE OFTEN WILL BE DOCUMENTS
24 ABOUT HOW THE NEW PRODUCT WILL HARM COMPETITORS.

25 THAT MAY VERY WELL BE THE MOTIVATION. WE DON'T CONSIDER

1 THAT AT ALL. SO LONG AS IT IS A GENUINE PRODUCT IMPROVEMENT
2 AND NOT A SHAM, THAT'S THE END OF THE -- THAT SHOULD BE THE END
3 OF THE INQUIRY.

4 THE COURT: SO IS THIS A PRODUCT IMPROVEMENT?

5 MR. ASIMOW: YES, IT'S A NEW PRODUCT AT A LOWER
6 PRICE.

7 THE COURT: OKAY.

8 MR. ASIMOW: AND, OF COURSE, THE LAST THING YOU WANT
9 TO DO WITH ANTITRUST LAW IS CHILL COMPANIES FROM LOWERING
10 PRICES. YES, IT'S TRUE, IT CAN BE AN ANTICOMPETITIVE STRATEGY,
11 BUT THE CASE LAW THAT THE COURT ALLUDED TO MAKES THE POINT THAT
12 WE ARE INCREDIBLY SKEPTICAL OF THAT PARTICULAR THEORY OF
13 ANTICOMPETITIVE CONDUCT, AND SINCE THE SUPREME COURT'S DECISION
14 IN THE BROOKE GROUP CASE, THAT'S ESSENTIALLY AN IMPOSSIBLE
15 THEORY TO PROCEED ON.

16 WITH REGARD TO THE AUTHORIZED GENERICS IN THE HUMAN
17 PHARMACEUTICAL SPACE, THERE HAS BEEN A LOT OF DEBATE ABOUT
18 THAT, AND THERE WAS A TIME WHEN IT WASN'T CLEAR IF THAT WAS
19 SOMETHING A BRAND COMPANY COULD DO UNDER THE HATCH-WAXMAN ACT.

20 BUT THE FTC LONG AGO CONCLUDED THAT AUTHORIZED GENERICS
21 WERE BENEFICIAL TO COMPETITION, AND IN FACT, ALMOST ALL OF THE
22 CASES HAVE BEEN ABOUT, AND MANY OF CASES THAT MR. OWEN CITES,
23 ARE WHEN THE BRAND COMPANY AGREES NOT TO DO AN AUTHORIZED
24 GENERIC.

25 THE COURT: RIGHT.

1 MR. ASIMOW: THAT'S WHAT'S ANTICOMPETITIVE.

2 THE COURT: YES.

3 MR. ASIMOW: THE GENERIC COMPANY, THE EQUIVALENT OF
4 TEVRA, IS DELIGHTED NOT TO HAVE TO COMPETE WITH AN AUTHORIZED
5 GENERIC, BUT THAT HAS BEEN HELD CONSISTENTLY TO BE
6 ANTICOMPETITIVE.

7 AND HERE, TOO, RIGHT, THE -- TEVRA WOULD HAVE MORE
8 COMPETITION WITH MORE GENERICS ON THE MARKET, WHETHER THEY COME
9 FROM PETLOCK OR WHETHER THEY COME FROM BAYER. YES, IT MAKES
10 ITS LIFE MORE DIFFICULT, BUT THAT'S COMPETITION.

11 YOU KNOW, IN GENERAL, AS THE COURT'S POINTED OUT, ALTHOUGH
12 ON THIS POINT I THINK THE PHARMACEUTICAL CASES HAVE SOME
13 PERTINENCE BECAUSE THEY SAY THAT AN AUTHORIZED -- THAT NOT TO
14 DO AN AUTHORIZED GENERIC IS ANTICOMPETITIVE.

15 ON THE MARKET ISSUE DEFINITION, THAT REALLY IS A SPECIAL
16 MARKET WHERE IN ALMOST EVERY STATE -- MAYBE IT'S EVERY STATE
17 NOW -- THE PHARMACIST IS REQUIRED TO SUBSTITUTE THE GENERIC
18 BRAND UNLESS THE DOCTOR WRITES "DO NOT SUBSTITUTE." SO YOU
19 HAVE VERY UNUSUAL MARKET DEFINITION PATTERNS IN THOSE CASES.

20 THE COURT: SURE.

21 MR. ASIMOW: IF THE COURT WOULD INDULGE ME, I WOULD
22 JUST COMMENT --

23 THE COURT: OH, WOULD YOU --

24 MR. ASIMOW: GO AHEAD.

25 THE COURT: YOU MENTIONED A CASE YOU WANTED ON THE

1 PRODUCT IMPROVEMENT CASES. I DIDN'T GET THE NAME OF THAT CASE.

2 MR. ASIMOW: IT'S CITED IN OUR BRIEF. IT'S ALLIED
3 ORTHOPEDIC, AND IT IS -- LET'S SEE. IT'S CITED IN THE OPENING
4 BRIEF ON PAGE 16.

5 THE COURT: OKAY, GOOD. I WAS LOOKING AT THE REPLY
6 BRIEF, BUT I HAD THE WRONG BRIEF IN FRONT OF ME.

7 MR. ASIMOW: WOULD YOU LIKE THE CITE?

8 THE COURT: NO. IF IT'S IN THE BRIEF, I HAVE IT. I
9 HAVE THE NAME NOW.

10 MR. ASIMOW: OKAY. THANK YOU.

11 THE COURT: OKAY. GO AHEAD.

12 MR. ASIMOW: I'LL JUST COMMENT ON THREE POINTS THAT
13 MR. OWEN RAISED ABOUT APPLICATION OF THE HYPOTHETICAL
14 MONOPOLIST TEST, AND EACH OF THESE WITH CLOSER SCRUTINY IS NOT
15 A HYPOTHETICAL MONOPOLIST TEST AND DOESN'T SUPPORT THE
16 INFERENCE THAT PLAINTIFF WOULD LIKE IT TO.

17 THE ALLEGED 64 PERCENT PRICE DIFFERENTIAL IS A PRICE
18 DIFFERENTIAL AT A MOMENT IN TIME. IT IS NOT ALLEGED THAT IT
19 WAS INCREASED TO 64 PERCENT.

20 AND AS THE COURT PREVIOUSLY HELD, AND THERE ARE MANY CASES
21 THAT SUPPORT THIS, A MERE PRICE DIFFERENTIAL IS NOT MARKET
22 DEFINING.

23 THE INCREASE IN PRICE OF 8 TO 17 PERCENT DURING THE TIME
24 THAT GENERIC FIPRONIL WAS INTRODUCED INTO THE MARKET, THE
25 DEFICIENCY THERE IS THAT WE DON'T HAVE A CONTROL. WE DON'T

1 KNOW WHAT HAPPENED TO FIPRONIL PRICES DURING THAT TIME, IN
2 ADDITION TO MY POINT THAT 8 TO 17 PERCENT OVER FIVE YEARS IS
3 NOT A -- IS NOT AN INCREASE AT A MOMENT IN TIME.

4 AND THEN WITH REGARD TO THE PETLOCK POINT, I THINK
5 MR. OWEN RAISED THAT PETLOCK SALES SEEM TO BE COMING FROM A
6 TRADE DOWN FROM K9 ADVANTIX.

7 WE DON'T DISPUTE THAT THE BRAND AND THE GENERIC OF THE
8 TOPICAL IMIDACLOPRID ARE IN THE SAME MARKET, AND THAT DOCUMENT
9 WOULD CERTAINLY TEND TO SUPPORT THE CONCLUSION THAT THE GENERIC
10 IS IN THE SAME MARKET AS THE BRAND.

11 IT DOESN'T REALLY TELL US, THOUGH, WHAT ELSE IS IN THAT
12 MARKET.

13 AND I HAVE A POINT I MADE BEFORE, WHICH IS THAT WE WOULD
14 EXPECT THERE TO BE MORE INTENSE COMPETITION BETWEEN BRANDED
15 GENERIC WITH THE SAME INGREDIENT.

16 THE COURT: SURE.

17 MR. ASIMOW: AND THAT, YOU KNOW, A SWITCHING, OR
18 DIAGONALLY BOTH SWITCHING YOUR ACTIVE INGREDIENT AND SWITCHING
19 WHETHER IT'S THE PREMIUM BRAND OR THE OFF PRICE GENERIC IS A
20 DOUBLE JUMP, BUT THAT DOESN'T MEAN THAT THE PRODUCTS ARE IN A
21 DIFFERENT MARKET. IT JUST MEANS THAT WITHIN THE MARKET, SOME
22 THINGS COMPETE MORE INTENSELY THAN OTHER THINGS DO.

23 I THINK THOSE WERE -- THOSE WERE THE MAIN POINTS I WANTED
24 TO RESPOND TO. I KNOW WE'VE BEEN AT IT FOR AWHILE.

25 THE COURT: I APPRECIATE THAT.

1 ALL RIGHT. WELL, THANK YOU. THIS HAS BEEN REALLY VERY
2 HELPFUL.

3 I'M GOING TO GIVE SOME THOUGHT TO THE SECOND BRAND
4 STRATEGY, BUT AS MR. CALLAGY POINTS OUT, IN TERMS OF PERSONAL
5 JURISDICTION, IT MIGHT STILL BOTTOM OUT BECAUSE THERE'S STILL
6 NOT ENOUGH EVIDENCE ON PURPOSEFUL DIRECTION.

7 BUT IT'S A -- IT'S A STRATEGY OF ANTICOMPETITIVE CONDUCT
8 THAT WOULD LIVE ON EVEN IF IT IS NOT -- EVEN IF BAYER GMBH IS
9 NOT A PARTY TO THE CASE.

10 MR. OWEN: SO, YOUR HONOR?

11 THE COURT: YES.

12 MR. OWEN: MR. ASIMOW RAISED SOMETHING THAT I -- IT
13 WAS NEW TO ME, AND I WOULD BEG THE COURT'S LEAVE TO CITE YOU TO
14 ONE PARAGRAPH IN THE SECOND AMENDED COMPLAINT IN RESPONSE.

15 THE COURT: OKAY.

16 MR. OWEN: I'M NOT JUST TRYING TO GET THE LAST WORD,
17 BUT I WASN'T READY FOR IT.

18 PARAGRAPH 117 ALLEGES THAT THE SECOND BRAND STOPPED BEING
19 OFFERED AND THAT IT, QUOTE, "CONTINUED UNTIL BAYER BEGAN
20 IMPLEMENTING ANOTHER STRATEGY TO BLOCK GENERIC ENTRY," AND
21 THOSE OTHER STRATEGIES ARE LISTED AT SECTIONS E3 -- OR E2, E3,
22 AND E4.

23 SO I JUST WANTED TO MAKE THE POINT THAT I DIDN'T EARLIER,
24 THAT IF HAVING A SECOND BRAND ON THE SHELF WAS PRO COMPETITIVE
25 AND BENEFITED CONSUMERS, IT STOPPED. THEY QUIT DOING IT AND

1 THEY YANKED ALL OF THE GENERICS, INCLUDING THEIR OWN, OFF THE
2 SHELF AS FAR AS WE CAN TELL BASED ON THE ALLEGATIONS IN E2 AND
3 E3 AND E4, AND THEY GOT RID OF THEM BY MAKING THIS NEW NO
4 GENERICS DEAL.

5 SO I WOULD AGAIN URGE THE COURT TO AGAIN TAKE A LOOK AT
6 PARAGRAPH 117, AND FURTHER 118 AND 119, WHEN EVALUATING WHETHER
7 IT'S PRO COMPETITIVE.

8 THEY'RE REALLY ASKING YOU TO FIND IT'S PRO COMPETITIVE AS
9 A MATTER OF LAW ON THE PLEADINGS, AND I WOULD URGE THE COURT --

10 THE COURT: WELL, I DON'T KNOW THAT STOPPING TO OFFER
11 A SECOND BRAND IS A SIGN THAT OFFERING IT WAS ANTICOMPETITIVE.
12 IT MIGHT HAVE FAILED. MAYBE NOBODY WANTED IT.

13 MR. OWEN: NO, I DON'T THINK STOPPING OFFERING IT
14 MEANS THAT IT WAS ANTICOMPETITIVE. BUT IT MEANS IT'S NOT PRO
15 COMPETITIVE BECAUSE IT'S NOT THERE FOR THE CONSUMERS TO BUY THE
16 CHEAPER PRODUCT.

17 IF THEY'RE ASKING --

18 THE COURT: WELL, NO, NO, NO. I'M -- LOGICALLY, THAT
19 DOESN'T MAKE SENSE BECAUSE YOU COULD PUT YOUR PRODUCT OUT THERE
20 AND IT'S CHEAPER AND IT'S THE SAME CHEMICAL AND NOBODY BUYS IT.
21 THAT DOESN'T MAKE IT ANTICOMPETITIVE JUST BECAUSE YOUR BUSINESS
22 FAILED.

23 MR. OWEN: WELL, WE'RE HOPING WE CAN DO THAT
24 EXPERIMENT.

25 THE COURT: I KNOW YOU ARE.

1 MR. OWEN: MY POINT IS -- MY POINT IS THAT IT'S BAYER
2 THAT'S CONTENDING THAT THEY ACTED PRO COMPETITIVELY BY OFFERING
3 THE CONSUMER A CHEAPER PRODUCT, BUT THEN THEY YANKED IT BACK.

4 THE COURT: OKAY. SO --

5 MR. OWEN: OKAY.

6 THE COURT: MR. ASIMOW, ANY COMMENT ON PARAGRAPH 117
7 TO 119?

8 MR. ASIMOW: WELL, I GUESS I DIDN'T REALIZE THAT THE
9 THEORY HERE WAS THAT IT WAS ANTICOMPETITIVE TO PRODUCE IT AND
10 IT'S ALSO ANTICOMPETITIVE TO STOP IT. THAT SORT OF SEEMS LIKE
11 A CAN'T WIN ARGUMENT.

12 BUT THAT'S EXACTLY IT. THE LAW IS YOU'RE ALLOWED TO
13 INTRODUCE AND IMPROVE A DISCOUNTED PRODUCT, AND YOU'RE ALSO
14 ALLOWED TO DISCONTINUE A PRODUCT, AND THERE CAN BE MANY REASONS
15 FOR THAT.

16 AND IT SEEMS ODD TO ME THAT TEVRA WOULD COMPLAIN -- IF
17 TEVRA THINKS THAT THE INTRODUCTION OF THE PRODUCT WAS
18 ANTICOMPETITIVE, THAT TEVRA WOULD ALSO COMPLAIN THAT THE
19 REMOVAL OF THE PRODUCT WAS ANTICOMPETITIVE. IT WOULD SEEM TO
20 ME THAT THAT WOULD ONLY BENEFIT TEVRA.

21 THE COURT: OKAY. THANK YOU FOR POINTING THAT OUT.
22 I WOULD HAVE MISSED THAT IN YOUR SECOND AMENDED COMPLAINT,
23 MR. OWEN.

24 ALL RIGHT. I'M GOING TO THINK THROUGH ALL OF THIS. I
25 REALLY APPRECIATE THE CARE THAT YOU'VE TAKEN AND THE ARGUMENT.

1 I WILL SAY ON THE MARKET DEFINITION, MR. ASIMOW, THAT I
2 FIND MANY OF YOUR POINTS COMPELLING AND I THINK THEY MAY TAKE
3 ME BEYOND WHAT I CAN DO ON A MOTION TO DISMISS.

4 AND THEN -- I MEAN, THEN WE ALL RECOGNIZE THAT AT SUMMARY
5 JUDGMENT, IF I HAVE DUELING EXPERTS, THEN MY HANDS ARE TIED.

6 SO I APPRECIATE THE DIFFICULTIES AS YOU GO FORWARD, BUT
7 THAT'S -- YOU KNOW, THAT'S WHERE I SEE IT IS. I THINK
8 YOU'RE TAKING ME OUT BEYOND WHERE I CAN BE.

9 BUT LET ME -- I'LL CERTAINLY LOOK AT IT THOROUGHLY.

10 OKAY. THANK YOU ALL. I MAY NOT SEE YOU AGAIN UNTIL
11 SUMMARY JUDGMENT, AND AT THIS POINT I DON'T ACTUALLY RECALL
12 WHEN THAT IS, BUT SINCE WE'RE DOING MOTIONS TO DISMISS SO LATE,
13 IT MAY BE SOON.

14 THESE CLAIMS ARE EITHER GOING TO BE IN OR OUT. THERE WILL
15 BE NO MORE AMENDMENT. I THINK WE ALL UNDERSTOOD THAT.

16 AND SO YOU CAN GO AHEAD AND PROCEED AS -- AND, YOU KNOW,
17 THIS IS A COMPLICATED ORDER. IT WON'T BE GOING OUT
18 IMMEDIATELY. BUT I THINK YOU HAVE A PRETTY GOOD SENSE.

19 OKAY. THANK YOU ALL.

20 MR. OWEN: THANK YOU, YOUR HONOR.

21 MR. ASIMOW: THANK YOU VERY MUCH. YOUR HONOR.

22 MR. OWEN: YOUR HONOR, JUST TO PREVIEW, THERE ARE A
23 SET OF DISCOVERY DEADLINES, AND MR. ASIMOW AND I HAVE ALREADY
24 TALKED ABOUT IT A LITTLE BIT, THEY'RE ALL GOING TO HAVE TO
25 MOVE.

1 THE COURT: OKAY.

2 MR. OWEN: THEY'RE VERY, VERY TIGHT.

3 THE COURT: SURE.

4 MR. OWEN: AND WE'LL VISIT ABOUT IT OFFLINE.

5 THE COURT: OKAY. JUST -- AND I'M GLAD YOU RAISED
6 THAT. I'M -- I HAVE NO CONCERN ABOUT YOU MODIFYING DISCOVERY
7 DEADLINES. ONCE IT IMPACTS YOUR SUMMARY JUDGMENT DATE, THEN
8 THE TRIAL DATE GETS POSTPONED. AND SO I JUST -- AND THAT'S
9 FINE. BUT I'M NOW SETTING CASES IN MID-2024, SO THAT'S WHAT
10 YOU'D BE LOOKING AT. I JUST WANT THAT TO -- AS SOME GUIDANCE.
11 IT'S NICE TO KNOW THAT BEFORE YOU HAVE THE CONVERSATIONS.

12 AND I WOULDN'T -- I WOULDN'T DISAGREE WITH A REQUEST TO
13 POSTPONE THE TRIAL AT ALL, BUT I JUST WANT YOU TO KNOW WHAT THE
14 REALITY IS.

15 MR. OWEN: I UNDERSTAND, YOUR HONOR.

16 THE COURT: OKAY. THANK YOU.

17 MR. ASIMOW: OKAY. THANK YOU AGAIN, YOUR HONOR.

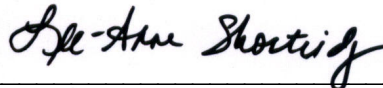
18 MR. OWEN: THANK YOU.

19 (THE PROCEEDINGS WERE CONCLUDED AT 11:03 A.M.)
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF ZOOM PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: NOVEMBER 24, 2021